Supreme Court, U.S.
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No.

In The Supreme Court Of The United States

BETTY MITCHELL, WARDEN,
Petitioner,

v.

GREGORY ESPARZA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

APPENDIX TO THE PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 00-4615; 01-3025

GREGORY ESPARZA,
Petitioner-Appellee/
Cross-Appellant,

v.

BETTY MITCHELL, Warden,
Respondent-Appellant/
Cross-Appellee.

Appeal from the United States District Court
for the Northern District of Ohio at Cleveland.
No. 96-07434 – Kathleen McDonald O'Malley,
District Judge.

Argued: August 8, 2002

Decided and Filed: November 5, 2002

As Corrected: November 20, 2002

Before: MERRITT, SUHRHEINRICH, and
DAUGHTREY, Circuit Judges.

COUNSEL

ARGUED: Charles L. Wille, ATTORNEY GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellant. Angela Wilson Miller, Columbus, Ohio, for Appellee. **ON BRIEF:** Charles L. Wille, ATTORNEY GENERAL'S OFFICE OF OHIO, CAPITAL CRIMES SECTION, Columbus, Ohio, for Appellant. Angela Wilson Miller, Columbus, Ohio, Jeffry F. Kelleher, Cleveland, Ohio, for Appellee. Paul L. Nelson, FEDERAL PUBLIC DEFENDER'S OFFICE, Grand Rapids, Michigan, for Amicus Curiae.

MERRITT, J., delivered the opinion of the court, in which DAUGHTREY, J., joined. SUHRHEINRICH, J., delivered a separate dissenting opinion.

OPINION

MERRITT, Circuit Judge. This is a death penalty case from Ohio, tried by a jury, in which the District Court issued the writ of habeas corpus as to the sentencing phase of the case. The principal problem in the case arises from the fact that the indictment did not charge the aggravating circumstance that made the crime capital, nor did the trial court instruct the jury on the subject, nor did the jury return a verdict finding one or more of the aggravating circumstances that permit a sentence of death. We first look at the Ohio death penalty statutes before explaining the facts and previous rulings of state and federal courts. It is clear from this review that the Ohio courts did not follow Ohio death penalty statutes created to comply with Supreme Court cases narrowing the class of offenders eligible for the death penalty under the Eighth Amendment.

Under § 2929.03 of Ohio law, entitled "Imposing Sentence for a Capital Offense," an indictment in a capital case "charging aggravated murder" must state the "aggravating circumstances" that make the defendant eligible for the death penalty:

> (A) If the indictment or count in the indictment charging aggravated murder *does not contain one or more specifications of aggravating circumstances listed in division (A) of § 2929.04 of the Revised Code*, then, following a verdict of guilty of the charge of aggravated murder . . ., *the trial court shall impose a sentence of life imprisonment* . . . . (Emphasis added.)

The indictment did not contain such a charge. The next section of the Ohio Code, § 2929.04, entitled "Criteria for Imposing Death," repeats this requirement, which is followed by a list of nine "aggravating circumstances" that allow the imposition of the death penalty:

> (A) *Imposition of the death penalty for aggravated murder is precluded* unless one or more of the following is specified in the indictment or count in the indictment . . . and proved beyond a reasonable doubt. (Emphasis added.)

Under subsection (B) of § 2929.03, if the defendant is to be tried for a capital offense in Ohio, the jury

> verdict *shall separately state* . . . whether the offender is guilty or not guilty of each specification [of an aggravating circumstance]. The *jury shall be instructed* on its duties in this regard. The instruction to the jury shall include an instruction that

> a *specification shall be proved beyond a reasonable doubt* in order to support a guilty verdict on the specification . . . . (Emphasis added.)

No instruction was given, and the jury did not return a verdict finding any aggravating circumstance. In the present case, the aggravating circumstance not found by the jury but later supplied by Ohio judges is found in § 2929.04(A)(7): "The offense [of murder] was committed while the offender was committing . . . robbery . . . and . . . *was the principal offender* in the commission of the aggravated murder . . . ." (Emphasis added.)

These death penalty provisions of the Ohio Code were adopted in 1981 in direct response to a series of cases in the Supreme Court of the United States interpreting the Eighth Amendment. As more fully discussed below, these cases require states to narrow or restrict the class of murderers who are subject to capital punishment. A state may do so by adopting by statute a set of "aggravating circumstances," as Ohio has done. Chief Justice Rehnquist's opinion in *Lowenfield v. Phelps*, 484 U.S. 231, 244, (1988), concisely summarizes the requirements of the Eighth Amendment in this respect:

> To pass constitutional muster, a capital sentencing scheme must "genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 103 S. Ct. 2733 (1983). Under the capital sentencing laws of most States, the jury is required during the sentencing phase to find at least one aggravating circumstance before it may impose death. By doing so, the jury narrows the class of persons eligible for

> the death penalty according to an objective legislative definition. *Zant*, *supra*, 462 U.S. at 878 ("Statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty"). (Citations omitted.)

Excusing the trial judge's failure to comply with the statutory provisions referred to above, the state courts, on their own initiative, after the jury trial and verdict, found the petitioner Esparza guilty of the aggravating circumstance that made him eligible for the death penalty, *i.e.*, being the "principal offender" in committing an aggravated murder while committing a robbery. The jury itself was never informed of the aggravating circumstances required, nor did it find that such a circumstance existed. The primary question is whether the State violated the Eighth Amendment, as well as state law, when it failed to either charge Esparza in the indictment with the aggravated circumstance for which the death penalty was imposed or instruct the jury on the aggravating circumstance and have the jury reach a verdict on the existence of the aggravating circumstance. We conclude that the District Court was correct in issuing the writ on this basis.

I. Facts

The case was tried on the theory that Esparza was the only participant in the crime. The State's proof showed that on the evening of February 12, 1983, a masked man entered the Island Variety Carryout in Toledo, Ohio, and approached the two store employees, Melanie Gerschultz and James Barailloux. Pointing a small black handgun at them, he ordered Gershultz to open the cash register. While she was doing this, Barailloux fled the store through a rear door,

entering the attached home of the store's owner. While he was alerting the owner of the robbery, he heard a shot. He returned to the store and found Gershultz lying on the floor, shot once in the neck, and the cash register open and missing approximately $ 110. Gershultz died shortly thereafter.

At trial a year later, both Esparza's sister and a fellow inmate testified that he confessed to the killing; and the sole witness to the robbery, James Barailloux, testified that the masked robber was short and husky, as was Esparza, and that he was wearing a dark blue jacket similar to the jacket Esparza's sister said Esparza wore that night. The jury returned a verdict of guilty on both counts late in the day on Thursday, May 10, 1984. A mitigation hearing was held on Tuesday, May 15, during which Esparza put on four witnesses who testified briefly in his behalf. He also gave to the jury his juvenile court file and a presentencing report prepared by the state, both of which contained information unfavorable to Esparza. The next day, the jury sentenced Esparza to death, and the trial court accepted the sentence.

After Esparza's trial, his appeals and his state post-conviction proceedings, a substantial volume of exculpatory evidence was revealed that was not turned over by prosecutors at trial. This evidence tended to prove that Joe Jasso was a participant in the crime and that Esparza did not act alone.

No information concerning Jasso was provided to the defense before trial. In information discovered as a result of a discovery request enforced by the district court below, Esparza learned that two individuals, Charles Hall and Stephen Billings, both separately reported to the Toledo Police Department that they had seen a Caucasian male and a Hispanic male in the Island Variety Carryout the night of the homicide. Hall and Billings both reported that the Caucasian

man was driving a Monte Carlo. Hall reported that he saw the Monte Carlo circle the Island Variety Carryout twelve times. Information implicating Jasso was also discovered as a result of district court-ordered release of tips collected by Crimestoppers, a privately funded program that works in conjunction with local law enforcement to gather information regarding unsolved crimes. Two days after the homicide, an unidentified caller stated that he had overheard Joe Jasso talking about the murder. The caller hung up before any additional information was obtained.

Prior to trial, the government eyewitness, Island Variety Carryout store clerk James Barailloux, provided a series of inconsistent descriptions of the assailant to the Toledo police department. Just days after the robbery and homicide occurred, Barailloux provided two slightly different descriptions of the assailant, both generally describing a white male in his mid-thirties, around 6' tall and weighing around 180 pounds. He did not mention a ski mask. Esparza was 19 years old at the time of the incident, 5'8" tall, Hispanic, and heavy-set in body type. Two months after the robbery, Barailloux described the perpetrator as either Caucasian or Hispanic and "husky." He provided no description of the assailant's clothing during that interview. Barailloux's description continued to change over time, and at trial he described the perpetrator as a large heavy-set man with a large neck wearing a green ski mask with gold stripes and a "puffy" blue jacket. None of the inconsistent descriptions were disclosed to the defense counsel before trial.

On direct appeal from the verdict of death, the Ohio Supreme Court found no reversible error in the trial, with two of the seven justices dissenting. *State v. Esparza*, 39 Ohio St. 3d 8, 529 N.E.2d 192 (1988). In state post-conviction proceedings, the Ohio Court of Appeals, in general,

conclusory language, found no Eighth Amendment error in either the failure of the trial judge to require that the aggravating circumstance be charged in the indictment or the failure to require that the aggravating circumstance be found by the jury beyond a reasonable doubt after being instructed on its duties in this regard. *State v. Esparza*, No. L-84-225, 1994 WL 395114 (Ohio App. 6th Dist. July 27, 1994).[1] The Ohio Supreme Court dismissed the appeal without opinion. *State v. Esparza*, 70 Ohio St. 3d 1473, 640 N.E.2d 845 (1994).

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[1] The Eighth Amendment issue was clearly raised in the Ohio courts. For example, Esparza's first assignment of error in the Court of Appeals said:

> APPELLANT ESPARZA'S DEATH SENTENCE IS VOID AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

The Court described the argument as follows:

> Under his first assignment of error, Esparza contends that his death sentence is void in that the state failed to allege and the jury failed to find all of the elements of a capital specification. In particular, appellant asserts that the indictment failed to allege a death penalty specification because it did not allege that he was either the principal offender or that he committed the aggravated murder with prior calculation and design. Appellant further asserts that the jury instructions at the guilt phase of his trial below were similarly defective.

1994 WL 395114, at *5.

The District Court disagreed. It concluded that the procedure followed by the State in sentencing Esparza to death violated the line of Supreme Court cases following *Furman v. Georgia*, 408 U.S. 238 (1972), establishing new Eighth Amendment standards for the states to follow in death cases. The Court based its ruling on the failure of the Ohio courts to follow their own statutory rules designed to render Ohio's death penalty scheme constitutional under these Eighth Amendment cases:

> Here, the trial judge, led down this path by the defective indictment, charged the jury as to one offense -- aggravated murder -- but sentenced Esparza as if he had been convicted of an entirely separate offense -- capital murder . . . . As the Supreme Court said in *Sullivan v. Louisiana*, 508 U.S. 275, [279] (1993), "to hypothesize a guilty verdict that was never in fact rendered -- no matter how inescapable the finding to support that verdict might be -- would violate the jury trial guarantee."

This post-hoc determination by an appellate court of what the jury would have done *if* the capital specifications question had been presented to it is particularly troubling in light of the capital scheme at issue here. As discussed later in this opinion, the Ohio Supreme Court, this Court, and the Sixth Circuit have all relied upon the existence of the capital specifications set forth in Ohio Rev. Code § 2929.04(A)(7) to conclude that the Ohio capital scheme has sufficiently narrowed the class of persons subject to the death penalty to render that scheme constitutional under *Zant v. Stephens*, 462 U.S. 862 (1983).

Thus, the Ohio Supreme Court has emphasized that a defendant may not be subject to the death penalty for a mere violation of Ohio Rev. Code § 2903.01(B); before the death penalty can be imposed, the state "must *additionally* prove that the offender was the principal offender in the commission of the aggravated murder or, if the offender was not the principal offender, that the aggravated murder was committed with prior calculation and design." *State v. Jenkins*, 473 N.E.2d 264 (Ohio 1984), *cert. denied*, 472 U.S. 1032 (1985) (emphasis added). *See also State v. Barnes*, 495 N.E.2d 922, 925 (Ohio 1986), *cert. denied*, 480 U.S. 926 (1987) ("the trial court had to find that [the defendant] committed murder while committing or attempting to commit [a specified felony] *and, further*, that [the defendant] was the principal offender or that the murder was premeditated"). And, federal courts, as this one does here, have relied upon this interpretation of Ohio's capital scheme, by the highest court in the state, as support for the conclusion that Ohio's capital scheme does narrow the class of persons to whom the death penalty can be applied, and does not use the precise same factors both to convict for can be applied, and does not use the precise same factors both to convict for aggravated murder and to subject one so convicted to the death penalty. *See, e.g., Scott v. Mitchell*, 209 F.3d 854, 885 (6th Cir. 2000).

Where the existence of the specifications under Ohio Rev. Code § 2929.04(A)(7) and of the state's obligation to prove those specifications as additional factors, are critical to the constitutionality of the capital scheme, a failure to charge those factors or submit them to the jury surely must be structural. Because the state failed to indict Esparza for the

> offense of capital murder, and failed to instruct the jury to find all elements of the offense of capital murder, and because that error is not susceptible to a review for harmless error, Esparza is correct that imposition of the death penalty upon him would be unconstitutional.

Esparza v. Anderson, No. 3:96-CV-7434, at 77-80 (N.D. Ohio Oct. 13, 2000) (footnotes omitted).

The question before us is whether this analysis of the Eighth Amendment requirements in capital cases is erroneous.

II. Analysis

Justice Scalia concisely pointed out in his dissenting opinion in *Almendarez-Torres v. United States*, 523 U.S. 224, 257 n.2, (1998), a fundamental principle of modern death penalty jurisprudence:

> Neither the cases cited, nor any other case, permits a judge to determine the existence of a factor which makes a crime a capital offense. . . . The person who is charged with actions that expose him to the death penalty has an absolute entitlement to jury trial on *all the elements of the charge*.

(Emphasis added.) Although stated in dissent, it seems clear that a majority, and perhaps all, of the members of the Supreme Court agree with Justice Scalia on this point. The author of the Court's opinion in *Almendarez-Torres*, Justice Breyer, expressed the same view in his concurring opinion in *Ring v. Arizona*, 122 S. Ct. 2428 (2002), when he observed "that jury sentencing in capital cases is mandated by the Eighth Amendment." *Id.* at 2446. In *Ring*, a majority of the

members of the Court reached the same conclusion on the basis of the jury trial guarantee in the Sixth Amendment.

The same essential point was made by Chief Justice Rehnquist in the portion of his opinion for the Court in *Lowenfield*, quoted above. Fundamental principles from both the Due Process Clause and the Eighth Amendment, as the District Court held in its opinion quoted above, apply to the facts of this case because the jury never found the statutorily required aggravating circumstance, which, in Justice Scalia's words supplies the "factor which makes [the] crime a capital offense." This error is unquestionably a violation of the Eighth Amendment.

Justice Scalia's point is reinforced by the language of the Court's earlier per curiam opinion in *Presnell v. Georgia*, 439 U.S. 14, 16 (1978), a capital case, similar to the instant case in which the Georgia Supreme Court supplied the aggravator element of the capital offense, on which the jury was silent:

> In *Cole v. Arkansas*, 333 U.S. 196 (1948), petitioners were convicted at trial of one offense but their convictions were affirmed by the Supreme Court of Arkansas on the basis of evidence in the record indicating that they had committed another offense on which the jury had not been instructed. In reversing the convictions, Mr. Justice Black wrote for a unanimous Court:
>
> > "It is as much a violation of due process to send an accused to prison following conviction of a charge on which he was never tried as it would be to convict him upon a charge that was never made. . . "To conform to due process of law, petitioners were entitled to have the validity of

> their convictions appraised on consideration of the case as it was tried and as the issues were determined in the trial court." *Id.* at 201-202."
>
> These fundamental principles of procedural fairness apply with no less force at the penalty phase of a trial in a capital case than they do in the guilt-determining phrase of any criminal trial. *Cf. Gardner v. Florida*, 430 U.S. 349 (1977).

We also agree with the district judge that the error cannot be overcome by employing "harmless error." None of the seminal Supreme Court Eighth Amendment cases requiring the narrowing of the class of defendants eligible for the death penalty permits the offender to be executed because the error was deemed harmless. *Furman v. Georgia*, 408 U.S. 238 (1972); *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976) (automatic or mandatory death penalty does not comply with "the holding in *Furman* . . . that the vesting of standardless sentencing power in the jury violated the Eighth . . . Amendment"); *Godfrey v. Georgia*, 446 U.S. 420, 429 (1980) ("The standardless and unchanneled imposition of death sentences in the uncontrolled discretion of a basically uninstructed jury in this case was in no way cured by the affirmance of those sentences by the Georgia Supreme Court."). The death penalty for all such offenders has been set aside, not reviewed for harmless error. And in the *Presnell v. Georgia* case, *supra.*, the Supreme Court did not send the case back for harmless error review.

A state may not adopt a valid statute and then decline to carry it out. To allow a state to construct a constitutionally valid death penalty statute that establishes a fact to be proved to the jury beyond a reasonable doubt but permits judges to ignore the statute in order to impose the death penalty is the same as dispensing with the reasonable doubt requirement

deemed not subject to harmless error analysis in *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1993) ("The Sixth Amendment requires more than appellate speculation about a hypothetical jury's action, or else directed verdicts for the State would be sustainable on appeal . . . ."). It is not the same as dispensing with the minor element of "materiality" in a federal white collar tax case found subject to harmless error analysis in *Neder v. United States*, 527 U.S. 1 (1999). There is no suggestion in the Chief Justice's opinion in *Neder* that harmless error would protect a directed verdict for the State on a crucial finding under the Eighth Amendment in a capital case. In *Neder*, Justice Stevens specifically points out in his concurring opinion that such harmless error would not apply to capital cases where "there is a special danger that elected judges may listen to the voice of voters rather than witnesses." 527 U.S. at 28.

We find no federal appellate case that allows the judge, in violation of a state statute creating aggravating factors to be found by a jury beyond a reasonable doubt, to direct a verdict on the crucial aggravating factor that permits the death sentence. Harmless-error review in such cases should apply only when the jury has actually performed its function under the Eighth Amendment. The jury in this case never made a judgment at all on the only possible aggravating circumstance -- a constitutionally indispensable requirement without which the death penalty cannot be imposed. The State's argument that the error here can be excused as harmless would lead to the conclusion that any, or all, elements required by a state's capital sentencing system may be supplied by judges rather than the jury. Neither the Eighth Amendment nor Ohio's own statutes adopted in order to comply with it permit such a gross deviation from the principle of jury sentencing according to expressly stated, clear statutory standards.

In this case, even if harmless error analysis were appropriate, we are faced with the problem that suppressed evidence discovered for the first time in the District Court in this proceeding raises a question about whether Esparza acted alone. There is new evidence by two witnesses, suppressed by the prosecution at trial, that there were possibly two participants in the crime, Joe Jasso and Esparza. The basis on which Ohio judges directed a verdict on the "principal offender" aggravator -- that there was only one participant in the crime -- appears now to be called into question. Thus the basis for the State's harmless error argument in the State courts has been undermined by the new evidence.

III. Other Issues

Because we grant the writ as to his sentence of death on Eighth Amendment grounds, we need not reach the alternate grounds on which Esparza asks us to vacate the death sentence: that he was denied effective assistance of counsel at sentencing, that his rights were violated when he was denied a continuance to prepare for the sentencing phase, and that his rights were violated through cumulative error in the sentencing phase.

Esparza also advances three grounds on which he asks us to grant a general writ invalidating his convictions for aggravated murder and aggravated robbery. He claims that (1) he was denied effective assistance of counsel at trial; (2) that his rights were violated when the state did not provide him with all available relevant, material, and exculpatory evidence; and (3) that his rights were violated when the trial judge refused to recuse himself after conducting a witness certification hearing concerning threats allegedly made against a potential witness by Esparza's brother. We address these in turn.

A. Ineffective Assistance of Counsel

Esparza first claims that he was denied effective assistance of counsel at trial. Though he advances this as two separate grounds, arguing that ineffective assistance occurred both when his counsel failed to read the faulty indictment and when he did not conduct a thorough pretrial investigation or object to alleged prosecutorial misconduct, the claims are of a piece. To evaluate such claims, we apply the two-part test laid out in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). We may only reverse a state court ruling if it is contrary to or involves an unreasonable application of federal law. *See* 28 U.S.C. § 2254(d).

Esparza's claim that his counsel was ineffective when he failed to read the indictment is based on a fair point: any competent counsel should read an indictment. To succeed under *Strickland*, however, Esparza must also show he was prejudiced by the failure to object to the indictment. Had his counsel objected, there is little doubt that the prosecution would have amended the indictment to include the required language. It may have been counsel's strategy to leave the error in place. Thus, the decision of the Ohio courts to deny relief on this basis is reasonable, and so affirmed.

Esparza also claims ineffective assistance occurred when his counsel did not object to closing statements by the prosecution. In the questionable statements, the prosecution stated that the victim was shot while reaching for an alarm, and that "scientific evidence" showed the shooting was not accidental, although no evidence in the record supports these claims. Although these statements are somewhat misleading, they do not warrant issuance of the writ. Counsel is free to argue reasonable inferences from the evidence, so long as evidence on the record is not misstated. *See United States v. Young*, 470 U.S. 1, 11-12 (1985). Esparza also claims that

the prosecutor played upon the jury's passions and prejudices in asking for a conviction. Esparza's trial counsel could well have concluded that the prosecution's comments were not objectionable. Even assuming arguendo that they were objectionable, and that the trial counsel should have objected, Esparza does not prove the comments prejudiced him. In rejecting this claim, the Ohio court concluded that Esparza "failed to establish that the outcome of his trial would have been different had his trial counsel not committed the alleged errors." *Esparza*, 1994 WL 395114, at *10. This is a reasonable conclusion to be drawn after applying *Strickland*.

Esparza's claim that his counsel was ineffective when he failed to conduct a proper pretrial investigation fails for similar reasons. Although his counsel relied chiefly on the investigation of a private investigator, and neglected to interview some witnesses listed as potential government witnesses, Esparza is unable to explain how interviewing these individuals, or conducting a more thorough investigation, would have produced a different result at trial. His sister's testimony would still have been presented against him, likely leading to another conviction. Thus, the Ohio courts acted reasonably in concluding that the alleged errors did not prejudice Esparza's defense. On his claim of ineffective assistance of counsel at trial, relief is not warranted.

B. *Brady* Claim

Esparza also asks this court to issue the general writ based on the fact that the State withheld material exculpatory evidence from him at trial. As discussed above, the suppressed evidence tended to (1) impeach a witness's description of the individual who robbed Island Variety and shot Melanie Gershultz, (2) show that more than one individual committed the crime, and (3) show that police also

had other suspects in the crime before charging Esparza with the killing. Taken together, the evidence throws into doubt whether Esparza was the "principal offender" in this crime and thus merits a death sentence under Ohio law.

The question here, however, is whether the evidence also throws into doubt Esparza's conviction for aggravated robbery and aggravated murder. Under *Brady v. Maryland*, a state must disclose all material exculpatory evidence to a defendant before trial. 373 U.S. 83 (1963). To assert a successful Brady claim, a petitioner must show that (1) evidence favorable to the petitioner (2) was suppressed by the government and (3) therefore the defendant was prejudiced. *See Strickler v. Greene*, 527 U.S. 263 (1999). A defendant is prejudiced when "there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682 (1985). Our task here is to determine whether, when the defendant was deprived of the suppressed evidence, he still received a "fair trial, understood as a trial resulting in a verdict worthy of confidence." *Strickler*, 527 U.S. at 290 (quoting *Kyles v. Whitley*, 514 U.S. 419, 434 (1995)).

After considering the evidence, we conclude that Esparza's trial was not fatally flawed at the guilt phase of the case, although obviously the suppressed evidence should have been produced. The suppressed evidence tended to show that (1) one witness's statement that the robber/shooter in the store resembled Esparza may have been wrong, and (2) that another individual may have been involved in the crime. Even after this, however, there remains other significant evidence against Esparza, in particular the testimony of two individuals to whom Esparza admitted shooting Melanie Gershultz. We note in particular that none of the suppressed evidence tends to show that Esparza was uninvolved in the

robbery and shooting; it merely shows that he may not have been the principal offender and may not have acted alone. Thus, his request for a general writ based on a *Brady* error is denied.

C. Certification Hearing

Finally, Esparza claims his rights were violated when the trial judge failed to recuse himself after conducting a pretrial witness-certification hearing pursuant to Ohio R. Crim. P. 12(B)(1)(c), under which the court may allow the state to withhold personal information about a prosecution witness when the prosecuting attorney "certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion." *Id.* The witness in question here was Catherine Stegg, Gregory Esparza's girlfriend and mother of his child, who feared that Esparza's brothers would harm her if they knew her whereabouts. In support of its certification request, the state provided information about Esparza's violent past. After the hearing, the judge granted the motion, allowing the state to exclude Stegg's personal information from discovery provided to Esparza.

The Ohio Supreme Court has held that it is error for a judge to preside at such a hearing and then preside at the subsequent trial, as the prejudicial information often revealed at such hearings could tend to prejudice a judge against a defendant. *See State v. Gillard*, 40 Ohio St. 3d 226, 533 N.E.2d 272, 274 (1988), *overruled on other grounds*, *State v. McGuire*, 80 Ohio St. 3d 390, 686 N.E.2d 1112 (1997). In such instances, however, harmless error analysis is appropriate. *Id.* at 277. Evaluating this claim on review, the Ohio Court of Appeals concluded that the error was harmless, noting in particular that the evidence that the judge heard at the hearing, "*i.e.*, appellant's history of violent

behavior, was also admitted at the penalty phase of the trial below." *State v. Esparza*, No. L-84-225, 1995 WL 302302, at *3 (Ohio App. 6th Dist. May 19, 1995). Rather than contending that the error was harmful, Esparza claims that such errors are "structural" and demand reversal in every instance. We disagree. The nature of the criminal justice system often requires judges to consider evidence and then dismiss it from their minds. *See, e.g., Withrow v. Larkin*, 421 U.S. 35, 39 (1975). Thus, harmless error analysis is called for here, and we find the Ohio court's conclusion that the error did Esparza no harm is a reasonable application of federal law.

Accordingly, the judgment of the District Court is affirmed.

DISSENT

SUHRHEINRICH, Circuit Judge, dissenting. The majority holds that the "Ohio courts did not follow Ohio death penalty statutes created to comply with Supreme Court cases narrowing the class of offenders eligible for the death penalty under the Eighth Amendment," *Maj. Op.* at 2, and that this failing cannot be overcome by employing "harmless error." *Maj. Op.* at 12-13. I agree that the state failed to properly indict Esparza for the offense of capital murder and failed to instruct the jury to find all elements of the offense of capital murder. However, I do not agree with the majority that this error cannot be subject to a "harmless error" analysis.

Although the majority basically sidelines it, *see Maj. Op.* at 14, this case is governed by the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (codified as amended at 28 U.S.C. § 2254 (Supp. 2002) ("AEDPA"), which provides in relevant part:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim-
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or

28 U.S.C. § 2254(d)(1).

In *Williams v. Taylor*, 529 U.S. 362 (2000), the Supreme Court explained the meaning of "contrary to" and "unreasonable application" in the statute. A state court's legal decision is "contrary to" clearly established federal law under § 2254(d)(1) "if the state court arrives at a conclusion opposite to that reached by [the Supreme] Court on a question of law or if the state court decides a case differently than [the Supreme] Court has on a set of materially indistinguishable facts." *Id.* at 412-13. An "unreasonable application" occurs when "the state court identifies the correct legal principle from [the Supreme] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case." *Id.* Under this standard, a state court decision is not unreasonable simply because the federal court concludes that the state court's decision is erroneous or

incorrect. *Id.* at 411. Rather, the federal court must determine that the state court's decision is an objectively unreasonable application of federal law. *Id.* at 410-12.

The *Williams* Court emphasized that "clearly established Federal law, as determined by the Supreme Court" refers to "the holdings, as opposed to the dicta, of [the Supreme] Court's decisions as of the time of the relevant state-court decision. *Id.* at 412.

Under the AEDPA, we are therefore reviewing the relevant state court decision. Esparza did not raise an Eighth Amendment claim on direct appeal in the state courts. He did not raise the issue until state post-conviction proceedings, and then he raised it as part of his Sixth Amendment ineffective assistance of appellate counsel claim. As the Ohio Court of Appeals stated:

> Appellant has now filed the present motion for delayed reconsideration in which he asserts that his original appellate counsel was ineffective for failing to raise the following assignments of error in the original appeal of his conviction and sentence to this court:
>
> *ASSIGNMENT OF ERROR NO. 1*
> APPELLANT ESPARZA'S DEATH SENTENCE IS VOID AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

State v. Esparza, No. L-84-225, 1994 WL 395114, at *3 (Ohio Ct. App. July 27, 1994) (unpublished per curiam), *cause dismissed*, 640 N.E.2d 845 (Ohio 1994). The Ohio Court of Appeals evaluated the assignment of error under the

Strickland standard.[1] *See id.* at *2 (setting forth *Strickland* test for ineffective assistance of counsel claims). As to this issue, the Ohio Court of Appeals concluded:

> Under his first assignment of error, Esparza contends that his death sentence is void in that the state failed to allege and the jury failed to find all of the elements of a capital specification. In particular, appellant asserts that the indictment failed to allege a death penalty specification because it did not allege that he was either the principal offender or that he committed the aggravated murder with prior calculation and design. Appellant further asserts that the jury instructions at the guilty phase of his trial below were similarly defective.
>
> On his original appeals before this court and the Supreme Court of Ohio, appellant asserted that his conviction was against the manifest weight of the evidence. Upon review, both this court and the Supreme Court determined that the verdict was not against the manifest weight of the evidence. In so finding, both courts necessarily determined that after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt. See *State v. Jenks*, (1991), 61 Ohio St.3d 259. Additionally, this court, in its decision of May 29, 1992, reviewing appellant's post-conviction appeal, addressed the merits of this assignment of error and found it not well-taken. As such, we find that there are no substantive grounds for relief under this assignment of error.

[1] *Strickland v. Washington*, 466 U.S. 668 (1984).

Id. at *5. In other words, it appears that the Ohio court concluded that there was no prejudice under *Strickland*. That is, appellate counsel's failure to raise the Eighth Amendment claim did not result in prejudice because of the overwhelming evidence against Esparza.[2]

As the district court suggested, it appears that the state court engaged in a harmless error analysis.[3] Our task

[2] The Ohio Court of Appeals did not address cause, presumably because it found that prejudice was not shown.

[3] The district court stated in relevant part:

> The state court conceded that there was no capital specification obvious on the face of the indictment, but concluded that this fact did not prohibit Esparza's conviction for capital murder. This is so, the state court reasoned, because it found that the indictment was sufficient, despite the absence of certain precise language, to put Esparza on notice of all of the elements of the offense with which he was charged. Thus, the state court found that the "principal offender" specification was implicit in the indictment because no one other than Esparza was charged with participating in the events described. The court stated:
>
> We conclude that where only one defendant is named in an indictment alleging felony murder, it would be redundant to state that the defendant is being charged as the principal offender. Only where more than one defendant is named need the indictment specify the allegation 'principal offender.'

under the AEDPA then is to determine whether application of harmless error analysis to an Eighth Amendment violation was an unreasonable application of, or contrary to, Supreme Court precedent, as of the time of the relevant state court decisions.

Since the landmark case of *Chapman v. California*, 386 U.S. 18 (1967), in which the Supreme Court held that some federal constitutional errors can be deemed harmless, the Supreme Court has found only a few constitutional errors that are so fundamental as to be automatically reversible and not subject to the harmless error analysis. *Arizona v. Fulminante*, 499 U.S. 279, 306 (1991); *see also Neder v. United States*, 527 U.S. 1, 7 (1999) (stating that "we have recognized a limited class of fundamental constitutional errors that 'defy analysis by "harmless error" standards'" (quoting *Fulminante*, 499 U.S. at 279)). Such "structural"

State v. Esparza, 1992 WL 113827, at *8 [sic] (Ohio App. May 29, 1992).

> It appears, accordingly, that without saying so expressly, the state court engaged in a harmless error analysis, finding that the absence of the words "principal offender" in the indictment was not meaningful where, as here, there was only one offender charged in that indictment.

Esparza v. Anderson, No. 96-CV-7434, slip. op. at 70 (N.D. Ohio. Oct. 13, 2000) (footnote omitted).

The district court failed to quote the last sentence of the foregoing paragraph in which the Ohio Court of Appeals stated that: "We further note that the words death penalty specification as to the first count are clearly typed on the front of the indictment." *Esparza*, 1992 WL 113827, at *9.

errors include the giving of an erroneous reasonable doubt instruction, *see Sullivan v. Louisiana*, 508 U.S. 275, 281-82 (1993), the appointment of an interested party's attorney as a prosecutor for contempt charges, *Young v. United States*, 481 U.S. 787, 809-14 (1987), the excusing of a juror for cause in a capital case who was not irrevocably committed to vote against the death penalty regardless of the facts and circumstances of the case, *Gray v. Mississippi*, 481 U.S. 648, 668 (1987), the unlawful exclusion of members of the defendant's race from a grand jury, *Vasquez v. Hillery*, 474 U.S. 254, 263-64 (1986), the denial of the right to a public trial, *Waller v. Georgia*, 467 U.S. 39, 48-50 & n.9 (1984), the abridgment of right to self-representation, *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984); the complete denial of right to counsel at trial, *Gideon v. Wainwright*, 372 U.S. 335 (1963); and trial before a biased judge, *Tumey v. Ohio*, 273 U.S. 510 (1927).

In each of these cases, the error affected the framework of the trial so that it was impossible to determine whether the result was correct. That is, "[e]ach of these constitutional deprivations is a similar structural defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself." *Fulminante*, 499 U.S. at 310. "Put another way, these errors deprive defendants of 'basic protections' without which 'a criminal trial cannot reliably serve its function as a vehicle for determination of guilt or innocence . . . and no criminal punishment may be regarded as fundamentally fair.'" *Neder*, 527 U.S. 1 at 8-9 (quoting *Rose v. Clark*, 478 U.S. 570, 577-78 (1986)) (alteration in original).

The Supreme Court has ruled that constitutional errors subject to harmless error review include:

Clemons v. Mississippi, 494 U.S. 738, 752-754 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (admission of evidence at the sentencing stage of capital case in violation of the Sixth Amendment Counsel Clause); *Carella v. California*, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497, 501-504 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction containing an erroneous rebuttable presumption); *Crane v. Kentucky*, 476 U.S. 683, 691 (1986) (erroneous exclusion of defendant's testimony regarding the circumstances of his confession); *Delaware v. Van Arsdall*, 475 U.S. 673 (1986) (restriction on a defendant's right to cross-examine a witness for bias in violation of the Sixth Amendment Confrontation Clause); *Rushen v. Spain*, 464 U.S. 114, 117-118, and n.2 (1983) (denial of defendant's right to be present at trial); *United States v. Hasting*, 461 U.S. 499 (1983) (improper comment on defendant's silence at trial, in violation of the Fifth Amendment Self-Incrimination Clause); *Hopper v. Evans*, 456 U.S. 605 (1982) (statute improperly forbidding trial court's giving a jury instruction on a lesser included offense in a capital court's giving a jury instruction on a lesser included offense in a capital case in violation of the Due Process Clause); *Kentucky v. Whorton*, 441 U.S. 786 (1979) (failure to instruct the jury on the presumption of innocence); *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (admission of identification evidence in violation of the Sixth Amendment Counsel Clause); *Milton v. Wainwright*, 407 U.S. 371 (1972) (confession obtained in violation of *Massiah v. United States*,

377 U.S. 201 (1964)); *Chambers v. Maroney*, 399 U.S. 42, 52-53 (1970) (admission of evidence obtained in violation of the Fourth Amendment); *Coleman v. Alabama*, 399 U.S. 1, 10-11 (1970) (denial of counsel at preliminary hearing in violation of the Sixth Amendment Confrontation Clause).

Fulminante, 499 U.S. at 306-07 (some citations omitted). In *Fulminante*, the Supreme Court explained that:

> The common thread connecting these cases is that each involved "trial error" -- error which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of other evidence presented in order to determine whether its admission was harmless beyond a reasonable doubt.

Id. at 307-08. The harmless error rule thus "promotes public respect for the criminal process by focusing on the underlying fairness of the trial rather than on the virtually inevitable presence of immaterial error." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988) (quoting *Rose v. Clark*, 478 U.S. at 577).

Although the Supreme Court has repeatedly indicated that "death is different," *see Woodson v. North Carolina*, 428 U.S. 280, 295 (1976) ("Death is qualitatively different from a sentence of imprisonment, however, long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two."); *see also* David McCord, *Is Death "Different" for Purposes of Harmless Error Analysis? Should It Be?: An Assessment of United States and Louisiana Supreme Court Case Law*, 59 La. L. Rev. 1105, 1165 n.2 (1999), the Court has never held that every constitutional error in a death penalty case is "structural." *Id.* at 1121. In fact, the Supreme Court has

employed the "structural defect" vs. "trial error" dichotomy in capital cases. *See, e.g., Sullivan*, 508 U.S. at 281-82; *Fulminante*, 499 U.S. at 284 (holding that admission of the defendant's coerced confession in a capital case was subject to harmless error analysis and was not harmless error); *Satterwhite*, 486 U.S. at 256-58 (approving harmless error analysis of admission in capital sentencing proceeding of psychiatric testimony obtained in violation of the Sixth Amendment); *Clemons*, 494 U.S. 738 (holding that the Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid aggravating circumstance either by reweighing the evidence or by harmless error review; remanding for clarification from Mississippi Supreme Court).

The majority proclaims that "[n]one of the seminal Supreme Court Eighth Amendment cases requiring the narrowing of the class of defendants eligible for the death penalty permits the offender to be executed because the error was deemed harmless." *Maj. Op.* at 11 (citing *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam); *Woodson v. North Carolina*, 428 U.S. 280, 302 (1976); *Godfrey v. Georgia*, 446 U.S. 420, 429 (1980)). In none of those cases, however, did the Supreme Court explicitly analyze the appropriateness of the harmless error test in Eighth Amendment cases. Thus, it is disingenuous for the majority to hold that because the death penalty for all such offenders was set aside in those cases and not reviewed for harmless error, the Supreme Court has affirmatively ruled that the errors in those cases were indeed structural and not subject to harmless error review. *Cf. Ring v. Arizona*, 122 S. Ct. 2428, 2443 n.7 (2002) (holding that statute allowing trial judge to determine presence or absence of aggravating factors required under state law for imposition of death penalty violated Sixth Amendment right to a jury trial in capital prosecutions; and stating that the Court did "not reach the

State's assertion that any error was harmless" because the Court ordinarily leaves it to lower courts to pass on the harmlessness of the error in the first instance).

In *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam), the Supreme Court held that the penalty of death may not be imposed under a sentencing scheme that creates a substantial risk that the punishment will be inflicted in an arbitrary and capricious manner. *Furman* made clear that a state may impose the death penalty only if its laws are shaped to narrow the class of offenders eligible for the death penalty. *Gregg v. Georgia*, 428 U.S. 153 (1976), reaffirmed the holding of *Furman*, stating that "where discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action." *Id.* at 189. In other words, a capital sentencing scheme must provide a "meaningful basis for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not." *Id.* at 188 (quoting *Furman*, 408 U.S. at 313). *See also Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980) (same) (plurality opinion); *Zant v. Stephens*, 462 U.S. 862 (1983) (ruling that jury's limited function of finding statutory aggravating circumstance does not render Georgia's statutory scheme invalid under *Furman*).

The issue in *Woodson* was "whether a death sentence returned pursuant to a law imposing a mandatory death penalty for a broad category of homicidal offenses constitutes cruel and unusual punishment within the meaning of the Eighth and Fourteenth Amendments." 428 U.S. at 287 (footnotes omitted). The *Woodson* Court explained that "[t]he issue, like that explored in *Furman*, involves the procedure employed by the State to select persons for the unique and irreversible penalty of death." *Id.* The *Woodson*

Court held that "in capital cases the fundamental respect for humanity underlying the Eighth Amendment, requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death." *Id.* at 304 (citations omitted). The Court therefore concluded that the death sentences imposed upon the petitioners under North Carolina's mandatory death sentence violated the Eighth and Fourteenth Amendments and had to be set aside. *Id.* at 305.

In these cases, the Supreme Court made clear that the Eighth Amendment imposes an underlying requirement on states to individualize capital sentencing *proceedings* to eliminate the arbitrary imposition of the death penalty. In *Clemons*, the Supreme Court described the thrust of the Eighth Amendment in this context:

> The primary concern in the Eighth Amendment context has been that the sentencing decision be based on the facts and circumstances of the defendant, his background, and his crime. *See, e.g., Spaziano v. Florida*, [468 U.S. 447, 460 (1984)]; *Zant v. Stephens*, [462 U.S. 862, 879 (1983)]; *Eddings v. Oklahoma*, 455 U.S. 104, 110-112 (1982); *Lockett v. Ohio*, 438 U.S. 586, 601-605 (1978) (plurality opinion); *Gregg v. Georgia*, 428 U.S. 153, 197 (1976) (joint opinion of Stewart, Powell, and Stevens, JJ.). In scrutinizing death penalty procedures under the Eighth Amendment, the Court has emphasized the "twin objectives" of "measured consistent application and fairness to the accused." *Eddings, supra*, at 110-111.'

Clemons, 494 U.S. at 748 (some citations omitted).

Ohio has such a capital sentencing scheme, which this Court has found constitutional. *See, e.g., Scott v. Mitchell*, 209 F.3d 854, 885 (6th Cir.), *cert. denied*, 531 U.S. 1021 (2000). But the issue in this case is not, as the majority's resort to Eighth Amendment jurisprudence might suggest, whether Esparza was sentenced under capital sentencing procedures that violate the Eighth Amendment under *Furman* and its progeny. Furthermore, this line of cases does not discuss the harmless error doctrine, and the majority supplies no authority which allows it to infer from the Court's silence that the doctrine is not applicable. Thus, in AEDPA terminology, the state court's ruling is not "contrary to" the Supreme Court precedent upon which the majority relies.

Rather, the issue is whether the State's failure to follow that scheme by failing to properly indict and instruct the jury on the element of capital murder constituted constitutional error of a structural type or is subject to harmless error analysis. Both myself and the majority struggle with the question of whether this is purely a violation of the Eighth Amendment or a violation of the Sixth Amendment right to trial by jury, or both.[4] There is no direct Supreme Court precedent to resolve this question, so we

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[4] The district court shared in this struggle. The lower court's analysis is an amalgam of the Fifth Amendment right to indictment by grand jury (albeit erroneously because this right does not extend to state prosecutions), the Fourteenth Amendment right to adequate notice (citing *In re Winship*, 397 U.S. 358 (1970)), the Sixth Amendment guarantee of trial by jury (citing *Apprendi v. New Jersey*, 530 U.S. 466 (2000)), and the Eighth Amendment right to be sentenced under a capital scheme that sufficiently narrows the class of person subject to the death penalty (citing *Zant v. Stephens*, 462 U.S. 862 (1983)).

cannot analyze the Ohio Court of Appeals decision under the "contrary to" clause of the AEDPA.

The question then becomes whether the state court's ruling is nonetheless an "unreasonable application" of clearly established Federal law. Without a clear answer on the subject, we must extend by analogy other Supreme Court decisions addressing the appropriateness of harmless error analysis. In my view, it is not unreasonable to analogize to Supreme Court precedent holding that omissions and misdescriptions of elements of an offense are subject to a harmless error analysis. *See, e.g., Neder*, 527 U.S. at 9-15 (cases involving Sixth Amendment right to trial by jury; discussing Supreme Court precedent holding that omission of an element of an offense and misdescription of an element are subject to harmless-error review). "Unlike such defects as the complete deprivation of counsel or trial before a biased judge an instruction that omits an element of the offense does not *necessarily* render a criminal trial fundamentally unfair or an unreliable vehicle for determining guilt or innocence." *Id.* at 9.

The majority draws a different conclusion, analogizing to the ruling in *Sullivan v. Louisiana*, 508 U.S. 275 (1993). *Sullivan* held that a defective "reasonable doubt" instruction in violation of the defendant's Fifth and Sixth Amendment rights is not subject to harmless error analysis because it "vitiates *all* the jury's findings," 508 U.S. at 281, and results in "consequences that are necessarily unquantifiable and indeterminate." *Id.* at 282. In *Neder*, the Supreme Court rejected the defendant's argument that *Sullivan* precluded the application of harmless error where an erroneous jury instruction omits the element of materiality because the jury could not render a "complete verdict" on every element of the offense. *Neder*, 527 U.S. at 11. The majority distinguishes *Neder* on the grounds that

"materiality" was a minor element in a tax fraud case, and further notes that "[t]here is no suggestion in the Chief Justice's opinion in *Neder* that harmless error would protect a directed verdict for the State on a crucial finding under the Eighth Amendment in a capital case." *Maj. Op.* at 12.[5]

However, *Neder* itself was not based on the fact that materiality was a minor element of the offense at issue. What the *Neder* Court did say is that "[t]he error at issue here – a jury instruction omits an element of the offense – differs markedly from the constitutional violations we have found to defy harmless-error review." *Neder*, 527 U.S. at 8. Noting that "[W]e have often applied harmless-error analysis to cases involving improper instructions on a single element of the offense," the Court proceeded to discuss its precedent on the subject. *Id.* at 9. The Court concluded that while "[i]t would not be illogical to extend the reasoning of *Sullivan*" to the failure to instruct on an element of the crime, "the matter is not *res nova* under our case law." *Id.* at 15.

Ultimately, however, it is the disagreement itself over the appropriate analogy – to *Neder* or *Sullivan* – that is most relevant here, because under the AEDPA, we are not to fault the state court's decision unless we find it contrary to or an unreasonable application of Supreme Court precedent. As the foregoing discussion reveals, the state court's decision is certainly not contrary to, nor in my view, an unreasonable application of, clearly established federal law as determined by the holdings of the Supreme Court.

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[5] At the risk of sounding unduly rhetorical, why would there be? *Neder* was not a capital case. And, as the majority well knows, the Supreme Court, as it is constitutionally required to do, speaks only to the issues properly before it.

Furthermore, in this case, I think the error was harmless. Although there was no capital specification in the indictment, as found by the Ohio Court of Appeals, the front page of the indictment states that Esparza was charged with: "AGGRAVATED MURDER – § 2903.01(B) – with a gun specification; AGGRAVATED ROBBERY – § 2911.01 – also with a gun specification; also a death penalty specification as to the first count[.]" Here, the jury was instructed completely and properly on the elements of aggravated murder, "defined as purposely causing the death of another while committing Aggravated Robbery." In addition, the jury was instructed that if it found Esparza guilty of Aggravated Murder, "it is then your duty to deliberate further and decide two additional factual questions called Specifications." As to the second specification, the trial court instructed the jury that the issue for decision was "whether the State has proved beyond a reasonable doubt that the offense of Aggravated Murder was committed while the Defendant was committing Aggravated Robbery." The State proceeded on the theory that one person committed the murder and robbery. Thus, in order to find Esparza guilty beyond a reasonable doubt, the jury must have found that Esparza "actually killed" Melanie Gerschultz. "Principal offender" has been defined under Ohio law as "the actual killer." *State v. Chinn*, 709 N.E.2d 1166, 1177 (Ohio 1999). Thus, although the jury was not explicitly instructed to make a finding under Section 2929.04(A)(7) that Esparza was "the principal offender in the commission of the aggravated murder," it necessarily had to make that finding in order to find Esparza guilty of the aggravated murder of Gerschultz on the facts before it.

In my view, the failure to properly instruct the jury under Section 2929.04(A)(7) involved a trial error "which occurred during the presentation of the case to the jury," that could therefore be quantitatively assessed against the other

evidence to determine if the error was harmless beyond a reasonable doubt. *Fulminante*, 499 U.S. at 307-08. More importantly, I do not think it unreasonable for the Ohio Court of Appeals to have done so because Esparza's trial still served as a reliable vehicle for the determination that he was guilty of capital murder. By the same token, I do not think the state court's conclusion that the error was in fact harmless in light of the "manifest weight of the evidence" was an unreasonable application of the harmless error doctrine either.

The majority also states that even if harmless error analysis were appropriate, "we are faced with the problem that suppressed evidence discovered for the first time in the District Court in this proceeding raises a question about whether Esparza acted alone." *Maj. Op.* at 13. The record in the district court reflects that the prosecution withheld evidence by two witnesses indicating that there were two participants in the crime, Esparza and Joe Jasso. Based on this evidence the majority concludes that "the basis on which Ohio judges directed a verdict on the 'principal offender' aggravator-that there was only one participant in the crime-appears now to be untrue," and that "the basis for the State's harmless error argument in the State courts has been undermined by the new evidence." *Maj. Op.* at 13. I would agree with the majority that this evidence would compel a finding that the error was not harmless here except that, as the majority notes elsewhere in its opinion in connection with Esparza's *Brady* claim, that "even after this, however, there remains other significant evidence against Esparza, in particular the testimony of two individuals that Esparza admitted to shooting Melanie Gershultz." *Maj. Op.* at 16. In short, I do not think that it can be said that the Ohio court's application of the harmless error doctrine was an unreasonable application of Supreme Court precedent to the facts of this case, even in light of the new evidence.

The majority also cites *Presnell v. Georgia*, 439 U.S. 14 (1978) (per curiam). There, the defendant was convicted in state court of three capital offenses; rape, kidnapping with bodily injury, and murder with malice aforethought. The Georgia Supreme Court ruled that the first two death sentences were invalid, because both depended upon the petitioner having committed forcible rape, and the court determined that the jury had not properly convicted the petitioner of that offense. The jury had been instructed during the guilt phase both on forcible and statutory rape, but did not specify in its verdict which offense it had found, and there was no jury finding of forcible rape at the penalty phase. The Georgia Supreme Court upheld the third death penalty imposed by the jury, in spite of the lack of a jury finding on forcible rape, on the grounds that evidence in the record supported the conclusion that the petitioner was guilty of that offense, which in turn established the element of bodily harm necessary to make the third capital crime, "kidnapping with bodily harm, aggravated sodomy," a sufficiently aggravating circumstance to justify the death sentence. *Id.* at 15-16. The United States Supreme Court reversed, given the absence of a jury finding of forcible rape. However, in that case, the Supreme Court did not consider whether the harmless error doctrine might be applicable.

Furthermore, *Presnell* is distinguishable because here, as I have noted, the jury necessarily found that Esparza was the actual killer, and therefore the principal offender. Thus, unlike *Presnell*, the jury in this case actually made a finding-albeit implicitly-on an element of the offense necessary to make Esparza's offense a capital crime. *Cf. Ring*, 122 S. Ct. 2428 (holding that capital defendants, like non-capital defendants, are entitled under the Sixth Amendment to a jury determination on any fact which increases their maximum punishment, invalidating statute that allowed sentencing

judge, rather than jury, to find aggravating circumstance necessary for imposition of the death penalty; reserving in a footnote question of whether harmless error test is applicable). I therefore do not find that the Ohio Court of Appeals decision was contrary to, or an unreasonable application of, *Presnell*.

This is a difficult question, but the AEDPA directs our hand in this case. I would reverse the district court's partial grant of the writ of habeas corpus.

I also object to the majority's conclusion that there was no ineffective assistance of counsel based on counsel's failure to read the indictment since "it may have been counsel's strategy to leave the error in place." *Maj. Op.* at 14. I do not think judges of this Court should countenance strategically placed errors by officers of the court.

I respectfully dissent.

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 3:96-CV-7434

GREGORY ESPARZA,
Petitioner,

v.

CARL ANDERSON, Warden,
Respondent.

Filed: October 13, 2000
Judge O'Malley

ORDER

For the reasons set forth in this Court's Memorandum and Order of this date, the Court grants Esparza's petition in part, and issues a writ of habeas corpus as follows. The respondent shall set aside Esparza's sentence of death and, instead, impose a life sentence under Ohio Rev. Code § 2929.03(A) for aggravated murder with no capital specification. The respondent shall re-sentence Esparza, within 180 days from the effective date of this Order. On this Court's own motion, execution of this Order and, hence, its effective date, is stayed pending appeal by the parties.

The Court hereby issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c) as to all issues raised by petitioner and certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal in forma pauperis would not be frivolous and can be taken in good faith. This matter is, hereby, **DISMISSED.**

IT IS SO ORDERED.

KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Case No. 3:96-CV-7434

GREGORY ESPARZA,
Petitioner,

v.

CARL ANDERSON, Warden,
Respondent.

Filed: October 13, 2000
Judge O'Malley

MEMORANDUM & ORDER

Gregory Esparza petitions this Court for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. Esparza challenges the constitutional sufficiency of his conviction by a jury for aggravated capital murder, and also challenges the constitutionality of the imposition of a sentence of death.

For the reasons set forth below, Esparza's petition for a writ of habeas corpus is **GRANTED in part** and **DENIED in part.** Specifically, the Court finds that Esparza's challenges to the constitutionality of his underlying

conviction are without merit. The Court further finds, however, that Esparza's challenge to the constitutionality of the imposition of the death penalty is well-taken, for the reasons explained herein.

Accordingly, the Court issues a writ of habeas corpus as follows. The respondent shall set aside Esparza's sentence of death and instead impose a sentence of life imprisonment, as mandated by Ohio Rev. Code § 2929.03(A) for any conviction for aggravated murder with no capital specification. This shall be done within 180 days from the effective date of this Order. On this Court's own motion, execution of this Order and, hence, its effective date, is stayed pending appeal by the parties.

I. PROCEDURAL HISTORY

On February 12, 1983, Melanie Gerschultz was shot and killed during an armed robbery of the Island Variety Carryout store in Toledo, Ohio, where she was working at the time. Some eight months later, on October 13, 1983, petitioner Esparza was indicted on two counts: (1) aggravated murder during the commission of an aggravated robbery, pursuant to Ohio Rev. Code § 2903.01; and (2) aggravated robbery, in violation of Ohio Rev. Code § 2941.141. Specifically, the indictment provided, in full:

> *THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that* GREGORY ESPARZA, on or about the 12th day of February, 1983, in Lucas County, Ohio, did purposely cause the death of Melanie Gerschultz, while committing aggravated robbery, in violation of

§ 2903.01(B) of the Ohio Revised Code, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO FIRST COUNT:
THE GRAND JURORS FURTHER FIND AND SPECIFY that the defendant had a firearm on or about his person or under his control while committing the offense pursuant to § 2929.71, Ohio Revised Code.

SECOND COUNT:
And THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do further find and present that GREGORY ESPARZA, on or about the 12th day of February, 1983, in or about his person or under his control, while committing a theft offense, in violation of § 2911.01 of the Ohio Revised code, being a felony of the first degree, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

SPECIFICATION TO SECOND COUNT
ADDITIONAL SPECIFICATION TO THE FIRST COUNT:

THE GRAND JURORS further find and specify that the said offense was committed while GREGORY ESPARZA, the accused herein, was committing armed robbery.

Esparza pleaded not guilty to the charges and proceeded to trial on May 4, 1984. The jury returned a verdict of guilty as to both charges on May 10, 1984. The trial court then held a sentencing hearing, pursuant to Ohio Rev. Code §§ 2929.022(A) & 2929.03. On May 16, 1984, the jury returned with the recommendation that Esparza be given the death penalty. The trial judge accepted the jury's recommendation and sentenced Esparza to death for his murder conviction. The trial judge also sentenced Esparza to serve seven to twenty-five years of imprisonment for his conviction for aggravated robbery, plus three years on the firearms specification.

Esparza appealed his convictions and sentence of death. The Ohio Court of Appeals affirmed, *State v. Esparza*, No. 12258, 1986 WL 9101 (Ohio Ct. App. Aug. 22, 1986), as did the Ohio Supreme Court. *State v. Esparza*, 529 N.E.2d 192 (Ohio 1988).[1] Esparza then filed a Petition for a

[1] Justice Brown wrote a dissenting opinion in which Justice Wright concurred. Justice Brown dissented because he believed that "the majority's interpretation of R.C. § 2929.03(D)(1) [the statute outlining the procedure for requesting and creating the pre-sentence investigation and psychological reports] is unconstitutional, forces ineffective assistance of counsel, violates the capital sentencing scheme in Ohio and, in the present case, results in a denial of the

Writ of Certiorari in the United States Supreme Court, which was denied. *Esparza v. Ohio*, 490 U.S. 1012 (1989).

Esparza also petitioned for post-conviction relief in state court, pursuant to Ohio Rev. Code § 2953.21. The trial court dismissed Esparza's petition. *State v. Esparza*, No. CR83-6602 (Ohio Ct. Common Pleas June 18, 1990). After

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defendant's rights under the Fifth Amendment." *Esparza*, 529 N.E.2d at 200.

Justice Brown found that the majority's interpretation of Ohio Rev. Code § 2929.03(D) allowed prejudicial information to be put before the jury that would not otherwise be admitted, such as the defendant's history as a drug abuser and his criminal arrest record. Justice Brown found that the most serious error which occurred was that, through the introduction of these reports, "the state was allowed to rebut mitigating factors which had not been raised by defendant." *Id.* at 201. He found that this unprovoked rebuttal had the further consequence of transforming "the non-existence of mitigating factors into aggravating circumstances not specifically enumerated in R.C. §2929.04(A)(1) through (8)." *Id.* Justice Brown, therefore, held that it was error for the judge not to keep out those aspects of the report which were "not relevant to the mitigating factors raised by defendant." *Id.* at 202.

Justice Brown also found that the manner in which the pre-sentence report was taken violated Esparza's Fifth Amendment privilege against compelled self-incrimination "because he was not advised before the psychological examination that he had the right to refuse to answer questions and that his statement could be used against him at the capital sentencing stage." *Id.* at 203.

being provided with records from the City of Toledo pursuant to a public records request, Esparza filed a second, or successor, petition for post-conviction relief in the trial court, based on the information provided by the City of Toledo.[2] The Court of Appeals affirmed the dismissal of Esparza's petition. *State v. Esparza*, No. L-90-235, 1992 WL 113827 (Ohio Ct. App. May 29, 1992).[3] Esparza then filed an appeal with the Ohio Supreme Court, which declined to exercise jurisdiction. *State v. Esparza*, 602 N.E.2d 250 (Ohio 1992).

Esparza also pursued relief pursuant to *State v. Murnahan*, 584 N.E.2d 1204 (Ohio 1992), where he asserted that appellate counsel had been ineffective. The Court of Appeals ordered Esparza's direct appeal reopened to consider issues relating to an *ex parte* certification hearing conducted by the trial judge. *State v. Esparza*, No. L-84-225, 1994 WL 395114 (Ohio Ct. App. July 27, 1994). After reopening, the

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[2] In *State ex rel. Clark v. City of Toledo*, 560 N.E.2d 1313, 1315 (Ohio 1990), the Ohio Supreme Court held that "a criminal defendant who has exhausted the direct appeals of his conviction may avail himself of Ohio Rev. Code §149.43 to support his petition for post-conviction relief." Section 149.43 allows individuals to obtain the investigatory files of law enforcement agencies, as well as other public documents.

[3] Judge Sherck dissented on the grounds that the indictment was invalid because it lacked a required specification and, thus, the trial court lacked jurisdiction to impose a sentence of death. *See Esparza*, 1992 WL 113827 at *9. Judge Scherk found that it was error to sentence Esparza to death because his indictment failed to mention an accomplice and failed "to charge the accused with being the principal offender, or committing the aggravated murder with prior calculation and design." *Id.* at *10.

Ohio Court of Appeals affirmed the trial court. *State v. Esparza*, No. L-84-225, 1995 WL 302302 (Ohio Ct. App. May 19, 1995). Esparza appealed to the Ohio Supreme Court, which denied his appeal. *State v. Esparza*, 660 N.E.2d 1194 (Ohio 1996).[4]

II. FACTUAL HISTORY

In its consideration of Esparza's direct appeal, the Ohio Supreme Court set out the factual history of this case, as revealed by the evidence adduced at Esparza's trial. The facts surrounding the underlying incident are as follows:

> At approximately 9:30 p.m. on February 12, 1983, a man entered the Island Variety Carryout in Toledo, Ohio, wearing a green ski mask and a dark blue jacket. The victim, Melanie Gerschultz, and James Barrailloux, both store employees, were the only other persons present and were standing in the back of the store as the man entered. The man approached the pair, pointed a small black handgun at them and ordered one of them to open the cash register at the front of the store. Gerschultz complied and walked towards the cash register. As she opened the register, Barrailloux crouched down and left the store through the rear door, entering the attached home of the store owner, Evelyn Krieger. While he was alerting Krieger of the robbery, they heard a gunshot. Barrailloux and Krieger re-entered the store to find Gerschultz lying on

[4] Justice Wright dissented for the same reasons he dissented in Esparza's direct appeal.

> the floor with a fatal gunshot wound in her neck. The cash register was open and approximately $110 was missing. A small round hole was found in the sheet of clear Plexiglas located to the side of the cash register, through which the bullet had apparently passed.

Esparza, 529 N.E.2d at 194.

At trial, Albert Richardson, a former cellmate of Esparza's, and Lisa Esparza, Esparza's sister, testified that Esparza told them he had robbed the convenience store and had shot Ms. Gerschultz. Barrailloux also testified that the perpetrator was of the approximate height, weight, build, and complexion of Esparza, though he could not actually identify Esparza. There was no physical evidence linking Esparza to the crime. Other relevant facts will be set forth when necessary during the Court's discussion of Esparza's individual claims for relief.

III. FEDERAL HABEAS PROCEEDINGS

On July 12, 1996, Esparza filed a notice of intent to file a petition for a writ of habeas corpus, motion for appointment of counsel, and motion to proceed in forma pauperis. The Court granted the latter two motions and appointed attorneys Randall L. Porter and Jeffry Kelleher as co-counsel for Esparza.

On September 5, 1996, Esparza filed his petition, and, on that same day, filed a motion to stay the execution of his death sentence. The Court granted Esparza's motion to stay

execution of his death sentence on September 6, 1996.[5] Respondent filed his return of writ on October 25, 1996. Esparza filed his traverse on April 1, 1997.

Esparza also filed a motion to expand the record, a motion to conduct discovery, and a motion to correct and expand the record. Esparza sought discovery relating to the following claims and issues: (1) under-representation of Hispanics in his petit and grand jury venires; (2) suppression of material exculpatory evidence by the prosecution; (3) failure by the trial court to appoint competent experts; and (4) ineffective assistance of counsel. The Court permitted Esparza to conduct limited discovery on some of these issues.

Esparza also filed a motion for an evidentiary hearing on the same issues. The Court granted the motion. Under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA"):

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court *shall not* hold an evidentiary hearing on the claim *unless* the applicant shows that —
>
> (A) the claim relies on —
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or

[5] The execution was scheduled to take place on September 10, 1996.

> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact-finder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (emphasis added). The Court concluded that Esparza had not *failed* to develop the factual basis of the claims for which he sought an evidentiary hearing, because he requested a hearing at virtually each stage of his state court proceedings, but was denied a hearing each time. *See Williams v. Taylor*, -- U.S. --, 146 L. Ed. 2d 435, 449 (2000) ("Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner's counsel"). Consequently, § 2254(e)(2) did not preclude an evidentiary hearing, and the determination of whether an evidentiary hearing was warranted fell within the Court's discretion pursuant to Rule 8 of the Rules Governing Habeas Corpus Proceedings.[6]

[6] This evidentiary hearing turned out to be very helpful to the Court's understanding and analysis of several of petitioner's claims.

At the hearing, four witnesses testified for the petitioner: Keithly Sparrow, Robert Dixon, Dr. Michael Gelbort and Lisa Esparza. Keithly Sparrow, Esparza's trial counsel, testified about his representation of Esparza during the guilt and mitigation phases of the trial. Sparrow stated that, when appointed, the trial judge informed him he would be working under "serious time constraints." Sparrow explained that he was not appointed to represent Esparza until March 8, 1984, and Esparza's trial commenced on April 30, 1984. Sparrow testified that he did not begin preparing for the mitigation stage of the proceedings until after Esparza was found guilty, leaving him only the course of a weekend to prepare for that stage of the trial. Sparrow also stated that he did not seek Esparza's prior school, medical or other records for the mitigation stage of the proceeding. He did not interview most members of Esparza's family, and those that he did interview, he interviewed inadequately because of his lack of research into Esparza's background. He further testified that he requested a pre-sentence investigation report without understanding the consequences of that request, and with very little knowledge of Esparza's background.

Robert Dixon, a lawyer with considerable experience in death penalty cases, discussed the level of skill, expertise and the standard of conduct an attorney should have when representing a defendant in a death penalty proceeding. He stated that Mr. Sparrow clearly fell below this standard by failing to prepare for the mitigation proceedings, by failing to adequately research Esparza's background – especially his family conditions and his mental disabilities, and by requesting the pre-sentence investigation report without understanding the ramifications of that request – that all information gathered for that report likely would be admitted into evidence.

Dr. Michael Gelbort, an expert in the field of neuropsychology, explained that damage to the frontal lobes of Esparza's brain, resulting from a childhood injury, causes him to have difficulty recognizing the consequences of an action before following through with that action. Dr. Gelbort also testified that, because of this injury, Esparza has difficulty controlling his impulses. Finally, Dr. Gelbort testified that this traumatic brain injury was severe enough to seriously impair Esparza's cognitive functioning, such that this intelligence level is borderline retardation.

Finally, Lisa Esparza testified that she was coerced by her then boyfriend, Frank Ochoa, into testifying against her brother in order to collect money from the "CrimeStopper" program. She further testified that the prosecutor and the police threatened to take away her children if she did not testify against Esparza. She claimed that this coerced testimony was false when given.

Three witnesses testified for the respondent: Judge Ruth Ann Franks, Detective Arthur Marx, and Frank Ochoa. Judge Ruth Ann Franks, the lead prosecutor in the case, testified in regards to the alleged coercion of Lisa Esparza, Esparza's sister, to testify against Esparza. She denied threatening Lisa Esparza in any way or coercing her to testify against her brother. She also discussed the open file policy at the prosecutor's office at the time of Esparza's trial. Detective Arthur Marx, the primary investigator in the murder of Melanie Gerschultz, discussed the investigation and Lisa Esparza's alleged coercion. He also denied coercing Lisa Esparza to testify against her brother.

Frank Ochoa was Lisa Esparza's boyfriend during the period when the incidents leading up to the trial and the trial itself took place. He testified that he did not coerce Lisa Esparza into testifying against her brother.

IV. ESPARZA'S GROUNDS FOR RELIEF

In his petition, Esparza asserts fifty-six (56) separate grounds for relief:

1. The indictment failed to contain all of the elements of the capital specification thereby violating Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

2. The State of Ohio improperly used an informant to solicit information from Petitioner after Petitioner's right to counsel attached, in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

3. The prosecutor's failure to provide trial counsel with exculpatory evidence violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

4. The prosecutor's threats to the witnesses that the state called to testify at trial violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

5. The prosecutor's statements to prospective witness[es] advising the witnesses not to speak with defense counsel violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

6. The under-representation of Hispanics and other cognizable groups in the venires from which Petitioner's grand jury and petit juries were drawn

violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

7. The trial court's conducting of an *ex parte* certification hearing violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

8. The trial court's securing of a promise from each prospective juror that she or he could vote to impose the death penalty violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

9. The prosecutor's excusal of all prospective jurors who had any scruples against the death penalty violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

10. The exposure of prospective jurors to extra-judicial sources of information concerning Petitioner's case[] violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

11. The acts and omissions of Petitioner's counsel during voir dire deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

12. The false and unreliable testimony of Lisa Esparza violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

13. The prosecutor's suppression of evidence caused trial counsel to be ineffective in violation of the Fifth,

Sixth, Eighth and Fourteenth Amendments to the United States Constitution[.]

14. The actions of Petitioner's trial counsel in failing to conduct an adequate trial phase investigation deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

15. The failure of Petitioner's trial counsel to request a review of the prior statements of the witnesses called to testify by the State of Ohio deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

16. The actions of Petitioner's trial counsel in calling Else Dile to testify[] deprived Petitioner Esparza of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

17. The actions and omissions of Petitioner's trial counsel in raising the wrong defense deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

18. The trial court failed to appoint a reasonable and necessary expert for the trial phase in violation of Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

19. Trial counsels' failure to object to an improper indictment, inadmissible evidence and improper jury instructions deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution.

20. The prosecutor's misconduct during the trial phase[] deprived Petitioner Esparza of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

21. The instructions provided to the jury in the trial phase violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

22. The trier of fact's verdicts were based upon insufficient evidence as to the elements of identity and specific intent to kill, thereby violating Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

23. There did not exist sufficient evidence in support of the capital specification, thereby violating Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

24. The trial court's failure to provide Petitioner Esparza with an independent, competent psychologist when this service was reasonably necessary to adequately present Petitioner's mitigation evidence violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

25. The trial court's refusal to permit Petitioner to withdraw his request for a Presentence Investigation and a Psychological Report violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

26. Petitioner was denied his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments because the trial court admitted a Presentence

Investigation Report which had been prepared without reference to the appropriate guidelines.

27. The trial court's admission of the Presentence Investigation, which contained numerous inaccuracies violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

28. The admission of the presentence investigation[,] which contained two prior reports prepared by the Lucas County Adult Probation Department concerning totally unrelated offenses violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

29. Petitioner Esparza was denied his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments[,] because he was not informed of his *Miranda* rights at the commencement of his interview by members of the Adult Probation Department.

30. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments[,] because the PSI cited to the fact that the Petitioner had exercised his right not to testify.

31. Petitioner was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments[,] because the PSI which was admitted into evidence contained numerous non-statutory aggravating circumstances.

32. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments because the jury was repeatedly informed during the mitigation phase of the Petitioner's prior criminal record, as both a juvenile and as an adult.

33. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments[,] because the trial court admitted a Psychological Report which had not been prepared pursuant to the required procedures.

34. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments because the trial court admitted a PSI which contained Petitioner's criminal record.

35. Petitioner was denied his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments because the Mitigation Psychological Report cited to the fact that the Petitioner had exercised his right not to testify.

36. Petitioner Esparza was denied his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments because he was not informed of his *Miranda* rights at the commencement of his interview by the members of the court clinic.

37. Petitioner Esparza was denied his rights under the Fifth, Sixth, Eighth, and Fourteenth Amendments because the Psychological Report which was admitted into evidence contained numerous non-statutory aggravating circumstances.

38. The trial court's wrongful admission of testimony that the Petitioner had an anti-social personality that "causes" him to deny his guilt as to offenses that he has in fact committed denied Petitioner his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

39. Petitioner Esparza['s] rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments were violated when the trial court denied defense counsel's requests for additional time to prepare for the sentencing hearing.

40. The admission of a photograph of the decedent and a photograph of the decedent's child violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

41. The trial court's admission of improper rebuttal testimony violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

42. The prosecutor's introduction of nonstatutory aggravating circumstances throughout the penalty phase, violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

43. The trial court's preclusion of mitigating evidence at the sentencing hearing violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

44. The errors and omissions of Petitioner's counsel during the mitigation phase deprived Petitioner of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

45. The prosecutor's misconduct during the mitigation phase[] deprived Petitioner Esparza of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

46. The trial court and prosecutor impermissibly shifted the burden of persuasion to the Petitioner in the sentencing phase in violation of Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

47. The trial court and prosecutor's repeated admonishments to the jurors that any death verdict was only a recommendation deprived Petitioner Esparza of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

48. The instructions provided to the jury in the mitigation phase violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

49. The instructions by the trial court in the mitigation phase, when viewed in their entirety, mandated a sentence of death in violation of the Fifth, Sixth, Eighth and Fourteenth Amendments.

50. The trial court's reliance upon nonstatutory aggravating circumstances, misconceptions of law, and its failure to recognize mitigating evidence and factors violated Petitioner's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

51. Petitioner Esparza's death sentence violates the Fifth, Sixth, Eighth and Fourteenth Amendments because residual doubt exists as to his conviction.

52. Petitioner Esparza['s] convictions and death sentence are unreliable due to the cumulative error that occurred in the trial and sentencing phases and

therefore his convictions and death sentence violate the Fifth, Sixth, Eighth and Fourteenth Amendments.

53. The actions and omissions of Petitioner Esparza's appellate counsel on direct appeal deprived Petitioner Esparza of his rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

54. The Lucas County Court of Appeals[‘] flawed appellate review violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

55. The statutory provisions governing the Ohio capital punishment scheme violate the Fifth, Sixth, Eighth and Fourteenth Amendments to the United States Constitution. This scheme is unconstitutional on its face and as applied to Petitioner.

56. The use of the same felony (aggravated robbery) to elevate the murder to aggravated murder and from aggravated murder to capital murder violated Petitioner Esparza's rights as guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments.

V. THE ANTITERRORISM AND EFFECTIVE DEATH PENALTY ACT OF 1996

As this Court previously concluded, the AEDPA, applies to this case because Esparza filed his petition for habeas corpus relief on September 5, 1996, after the AEDPA's effective date of April 24, 1996. The AEDPA changed federal habeas corpus law in several important respects. Among the most significant of these changes is the

standard of review to be applied to state court legal and factual determinations. Under the Act:

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim–
>
> > (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
> >
> > (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

28 U.S.C. §2254(d).

The Supreme Court, in *Williams v. Taylor*, -- U.S. --, 146 L. Ed. 2d 389 (2000), recently set forth the standard of review a federal habeas court must apply under § 2254(d).[7]

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[7] This decision displaces the Sixth Circuit's previous efforts in *Nevers v. Killinger*, 169 F.3d 352, 361-362 (6th Cir. 1998) and *Maurino v. Johnson*, 210 F.3d 638, 643-44 (6th Cir. 2000) to clarify this aspect of the statute. *See Harris v. Stovall*, 212 F.3d 940, 942 (6th Cir. 2000)

The Supreme Court provided definitions for the phrases "contrary to," "unreasonable application of" and "clearly established federal law" in § 2254(d)(1). *See id.*

The Supreme Court first pointed out that the phrases "contrary to" and "unreasonable application of" must be given independent meanings. *See id.* at 425. A state court decision can be "contrary to" the Supreme Court's clearly established precedent in two ways: (1) "if the state court arrives at a conclusion opposite to that reached by this Court on a question of law," and (2) "if the state court confronts facts that are materially indistinguishable from a relevant Supreme Court precedent and arrives at a result opposite to" that decision. *Id.*

The *Williams* Court also stated that the word "contrary" "is commonly understood to mean "diametrically different,' 'opposite in character or nature,' or 'mutually opposed.'" *Id.* Thus, §2254 "suggests that the state court's decision must be substantially different from the relevant precedent of [the Supreme Court]." *Id.* The Supreme Court suggested that this phrase would be applicable if the state court applies a rule that contradicts the governing law set forth in prior Supreme Court cases, such as if a state court were to hold that, in order to establish an ineffective assistance of counsel claim, a defendant must prove by preponderance of the evidence, instead of only a "reasonable probability," that the results of the trial would have been different. *Id.* at 426.

The Supreme Court held that an "unreasonable application" occurs when "the state court identifies the correct legal principle from this Court's decision but unreasonably applies that principle to the facts of the

prisoner's case."[8] The Court emphasized, however, that "unreasonable" means more than simply incorrect. *See id.* at 428. ("For purposes of today's opinion, the most important point is that an *unreasonable* application of federal law is different from an *incorrect* application of federal law.") (emphasis in original). "A federal habeas court may not find a state adjudication to be 'unreasonable' 'simply because that court concludes in its independent judgment that the relevant state-court decision applied clearly established federal law erroneously or incorrectly.'" *Harris v. Stovall*, 212 F.3d 940, 942 (6th Cir. 2000) (*citing Williams*, -- U.S. --, 146 L. Ed. 2d at 429).

The Supreme Court also pointed out that to determine the reasonableness of the state court's decision, a court must employ an objective test, not a subjective one. The Supreme

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[8] The Supreme Court also discussed a second aspect of the Fourth Circuit's test to determine whether the state court "unreasonably applied" applicable precedent. *See Williams*, -- U.S. --,146 L. Ed. 2d. at 427. The second part of the Fourth Circuit's test provides that a state court "unreasonably applied" Supreme Court precedent "if the state court either unreasonably extends a legal principle from our precedent to a new context where it should not apply or unreasonably refuses to extend that principle to a new context where it should apply." *Id.* The Supreme Court had reservations about this prong of the test, because it was imprecise and could be difficult to apply. The Court stated that, "although that holding may perhaps be correct, that classification does have some problems of precision." *Id.* at 427. Finding that the case in front of them did not require the Court to reach this issue, the *Williams* Court decided to leave for another day how such "extension of legal principle" cases should be treated.

Court, thus, rejected the Fourth Circuit's holding that a state court's application of federal law was only unreasonable "if the state court has applied federal law in a manner that reasonable jurists would all agree is unreasonable." *See Williams*, -- U.S. --, 146 L. Ed. 2d at 42. The Court reasoned that this test was too subjective because a court might "rest[] its determination. . . on the simple fact that at least one of the Nation's jurists has applied the relevant federal law in the same manner the state court did in the habeas petitioner's case." *Id.* at 428.

The *Williams* Court also provided further guidance for the phrase "clearly established by holdings of the Supreme Court." *See id.* at 429. The Court stated that this statutory phrase "refers to the holdings, as opposed to its dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* The Sixth Circuit has previously stated that "this provision marks a 'significant change' and prevents the district court from looking to lower federal court decisions in determining whether the state court decision is contrary to, or an unreasonable application of clearly established federal law." *Harris v. Stovall*, 212 F.3d 940, 944 (2000) (*quoting Herbert v. Billy*, 160 F.3d 1131, 1135 (6th Cir. 1998)).

The *Williams* Court referred to the jurisprudence it has developed under *Teague v. Lane*, 489 U.S. 288 (1989), to help guide federal courts as to what qualifies as "clearly established Federal law." *See Williams*, -- U.S. --, 146 L. Ed. 2d at 430. The *Williams* Court stated "[w]hatever would qualify as an 'old rule' under *Teague* will constitute 'clearly established Federal law, as determined by [this] Court.'" *Id.* Under Teague, "a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government." *Teague v. Lane*, 489 U.S. 288, 301 (1989). "To put it differently, a case announces a new rule if

the result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* "In determining whether the relief requested would constitute a new rule, the question becomes, 'whether a state court considering [the petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution.'" *Harris v. Stovall*, 212 F.3d at 944 (*quoting Caspari v. Bohlen*, 510 U.S. 383, 390 (1994)). *See also Saffle v. Parks*, 494 U.S. 484, 488 (1990).

VI. PROCEDURAL DEFAULT

Respondent argues that Esparza is precluded from pursuing many of his stated grounds for issuance of the writ on the grounds of procedural default.[9] The Court will address the question of procedural default with respect to those individual grounds respondent attacks on that basis.[10] As an initial matter, however, the Court here sets out the applicable law and addresses Esparza's more general arguments regarding the application of procedural default.

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[9] Respondent does not contend that any of petitioner's claims are unexhausted. Respondent asserts, rather, that certain of petitioner's claims could not have been presented to the state's highest court because of petitioner's procedural defaults at earlier stages of the proceedings. *See Coleman v. Thompson*, 501 U.S. 722, 732 (1991) ("A habeas petitioner who has defaulted his federal claims in state court meets the technical requirements for exhaustion; there are no state remedies any longer 'available' to him."). Although the state's failure to raise exhaustion does not invariably waive the defense, *see Granberry v. Greer*, 481 U.S. 129, 133-34 (1987), and it is petitioner's burden to prove exhaustion, *see Rust v. Zent*, 17 F.3d 155, 160 (1994), the Court sees no obvious exhaustion problems with the petition in this case

A. Legal Standards

Normally, a federal court may not consider "contentions of federal law which are not resolved on the merits in the state proceeding due to petitioner's failure to raise them as required by state procedure." *Wainwright v. Sykes*, 433 U.S. 72, 87 (1977). If a "state prisoner has defaulted his federal claims in state court pursuant to an independent and adequate state procedural rule, federal habeas review of the claims is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice." *Coleman v. Thompson*, 501 U.S. 722, 749 (1991).

In *Maupin v. Smith*, 785 F.2d 135 (6th Cir. 1986), the Sixth Circuit Court of Appeals set out the analytical framework for determining claims of procedural default. "When a state argues that a habeas claim is precluded by the petitioner's failure to observe a state procedural rule, the federal court must go through a complicated [four-step] analysis." *Id.* at 138.

> First, the court must determine that there is a state procedural rule that is applicable to the petitioner's claim and that the petitioner failed

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and does not engage in a *sua sponte* analysis of exhaustion where respondent has failed to raise it.

[10] The Court does not engage in a *sua sponte* analysis of procedural default where respondent has declined to raise the issue.

> to comply with the rule. . . . Second, the court must decide whether the state courts actually enforced the state procedural sanction. . . . Third, the court must decide whether the state procedural forfeiture is an "adequate and independent" state ground on which the state can rely to foreclose review of a federal constitutional claim. [And fourth, if] the court determines that a state procedural rule was not complied with and that the rule was an adequate and independent state ground, then the petitioner must demonstrate . . . that there was "cause" for him to not follow the procedural rule and that he was actually prejudiced by the alleged constitutional error.

Id. (citations omitted).

B. Esparza's Challenges to The Application of Procedural Default

Esparza attacks respondent's procedural bar arguments in three ways. First, Esparza challenges respondent's arguments with respect to each individual claim that respondent contends was waived, arguing either that they were raised below (and simply overlooked by respondent), or that, under *Maupin*, application of procedural default would be improper as to that claim. The Court will address these arguments in its discussion of Esparza's individual claims for relief. Second, Esparza asserts more general, *systemic*, challenges to the imposition of the procedural default rule as it relates to all of his claims; Esparza asserts a number of these arguments and each will be separately addressed. Esparza's third argument goes unstated but is implicit in the manner in which he presents his claims. It relates to claims

that were only raised in the context of ineffective assistance of counsel claims, as opposed to separate claims, in his state proceedings, but are asserted as independent claims in his federal action. Esparza argues that, because the state courts necessarily had to address the merits of the underlying, substantive claims in resolving the ineffective assistance of counsel claims – to determine cause and prejudice – his substantive claims *were* raised, and addressed, in his state action.

1. Systemic Challenges

a. Ohio's Procedural Rules Are Not Adequate Under Maupin Because They Are not Consistently and Regularly Applied

Esparza argues that none of the state procedural rules relied upon by respondent are "adequate" under the third prong of *Maupin*. A procedural rule is not "adequate," unless, among other things, it is regularly and consistently applied. *See Warner v. United States*, 975 F.2d 1207, 1213 (6th Cir. 1992) (stating that the rule only applies to "firmly established and regularly followed state practices.") (*citing Ford v. Georgia*, 498 U.S. 411, 422 (1991)).

Esparza contends that Ohio courts are inconsistent in their application of the procedural rules upon which respondent bases his waiver arguments, especially the *Perry* rule[11] and especially in capital cases, and that he thus cannot be held to have procedurally defaulted under *Maupin*. In

[11] *State v. Perry*, 226 N.E.2d 104 (Ohio 1967) (holding that any claim that was raised or could have been raised in direct appeal is barred from review on post conviction under the doctrine of res judicata).

support, Esparza cites to several capital cases in which the Ohio Supreme Court, on direct appeal, *sua sponte* addressed the merits of claims that the Court of Appeals had concluded were barred by res judicata, or considered claims that had not even been raised in the Court of Appeals, and, thus, *should have been* barred by res judicata.

Some of the cases relied on by Esparza clearly do not support his argument and are, in fact, inapposite. For instance, in each of the following three cases, a well-established exception to the res judicata doctrine applied, or the court did not actually engage in a merits review. Esparza first relies on *State v. Buell*, 489 N.E.2d 795, 811 (Ohio 1986). In *Buell*, the court analyzed the constitutionality of the imposition of the death penalty in light of the recently decided United States Supreme Court decision in *Caldwell v. Mississippi*, 472 U.S. 320 (1987), even though the petitioner did not raise the issue at trial, or in his appeal to the Ohio Supreme Court. The reason the Ohio Supreme Court considered the claim *sua sponte* was that it *could not have been raised before*. *Caldwell* was decided in 1985, after Buell's appeal had been filed and resolved by the Ohio Court of Appeals.

Similarly, in *State v. Huertas*, 553 N.E.2d 1058 (Ohio 1990), the Ohio Supreme Court resolved an issue and ultimately granted relief on the basis of a Supreme Court opinion, *Booth v. Maryland*, 482 U.S. 496 (1987), *overruled by Payne v. Tennessee*, 501 U.S. 808 (1991), which was issued after the petitioner's trial and after the appeal had been filed, but before the appellate court issued its decision. *Id. Booth* held that the use of victim impact evidence during the penalty phase of a capital trial is unconstitutional. There is no indication in the opinion itself that the petitioner had failed to raise a claim based on the use of victim impact statements. Thus, it is possible that the *claim* had been raised below, even

if the petitioner could not have relied on *Booth*. Thus, *Huertas* is unhelpful to Esparza.[12]

Esparza's reliance on *State v. Rogers*, 512 N.E.2d 581 (Ohio 1987), suffers from the same defect. The court considered a claim based on the prosecutor's evidentiary use of the petitioner's post-*Miranda* exercise of his right to silence, in violation of the recently decided *Wainwright v. Greenfield*, 474 U.S. 284 (1986). As in *Huertas* and *Buell*, the United States Supreme Court decision was issued after the petitioner's direct appeal to the Court of Appeals, and, thus, the appeal to the Ohio Supreme Court presented the earliest opportunity for raising the claim.

In other cases, however, the Ohio Supreme Court did appear to ignore the res judicata bar and address the petitioner's claims on the merits without explaining why it was doing so. *See State v. Williams*, 528 N.E.2d 910 (Ohio 1988) ("Because of the gravity of the sentence that has been imposed on appellant, we have reviewed the record with care for any errors that may not have been brought to our attention. In addition, we have considered any pertinent legal arguments which were not briefed or argued by the parties."); *State v. Barnes*, 495 N.E.2d 922 (Ohio 1986)(stating, "since the instant argument was neither raised before, nor ruled on by, the court of appeals, this court is not required to address it on the merits," but addressing the claim anyway); *State v. Hamblin*, 524 N.E.2d 476 (Ohio 1988) ("Because this is a capital case, we will review all five arguments [even those

[12] For many of the same reasons, *State v. Post*, 513 N.E.2d 754 (Ohio 1987), does not support Esparza's argument. As the Ohio Supreme Court itself noted, *Booth* had *just* been decided during the time in which the petitioner's appeal to the Ohio Supreme Court was pending.

not raised below] relating to the claim of ineffective assistance of counsel."); *State v. Esparza*, 529 N.E.2d 192 (Ohio 1988) (considering issue of jury venire, even though it was "challenge[d] for the first time on appeal").[13]

Esparza's argument is not without force. Ultimately, however, it is unpersuasive. As an initial matter, the Sixth Circuit has specifically held that Ohio's application of the res judicata doctrine under *Perry is* an adequate and independent state ground. *See Brooks v. Edwards*, 96 F.3d 1448 (Table), 1996 WL 506505, at *5 (6th Cir. Sept. 5, 1996) ("The procedural rule [of res judicata] applicable to petitioner's claim is an adequate and independent state ground for refusal to hear the claim by the Ohio Supreme Court."). As *Brooks* observed, "[t]he doctrine of res judicata has been explicitly set forth in numerous Ohio decisions, and Ohio courts have consistently refused to review claims on the merits under this doctrine." *Id.* (citations omitted).

That the Ohio Supreme Court occasionally chooses to address the merits of claims that are otherwise barred from review on the basis of res judicata does not mean that Ohio's law of res judicata is so inconsistent as to be inadequate, moreover. Rather, these are the exceptions that prove the rule. Consistency does not compel slavish adherence. As the Fourth Circuit has held, "[c]onsistent or regular application of a state rule of procedural default does not require that the state court show an 'undeviating adherence to such rule admitting of no exception.'" *Yeatts v. Angelone*, 166 F.3d 255, 263-64 (4th Cir. 1999) (*quoting Wise v. Williams*, 982 F.2d 142, 143 (4th Cir.1992)). Rather, the procedural rule is

[13] In virtually every case in which the Ohio Supreme Court has forgiven a procedural default, and addressed a claim on its merits, the Court has concluded that the claim was without merit.

adequate, if, as "a general rule, [it has] been applied in the vast majority of cases." *Plath v. Moore*, 130 F.3d 595, 602 (4th Cir.1997) (internal quotation marks omitted), *cert. denied*, 523 U.S. 1143 (1998). While the Ohio courts of appeals may not be paradigms of consistency, they do not ignore or arbitrarily decline to apply Ohio's procedural bars, including the *Perry* rule, on a regular basis. Indeed, the procedural bar is applied in the vast majority of cases, both capital and non-capital. Moreover, there has been no showing that, because of the above-mentioned exceptions, Esparza or other capital habeas petitioners *reasonably* came to believe that the *Perry* rule had been abandoned in capital cases.[14] Thus, there was no basis to conclude that the exception had become the rule, or that it would have been reasonable for a petitioner to assume that it had.[15]

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[14] Indeed, in several capital cases, the Ohio Supreme Court has enforced procedural bars. *See Bueke v. Collins*, Case No. C1-92-507, slip op., at 63-64 (S.D. Ohio Oct. 19, 1995) (collecting cases).

[15] The Ohio Supreme Court has expressly rejected the argument that procedural bars are or should be less strictly enforced in capital cases:

> The mere fact that punishments differ provides no basis to assert that procedural rules should differ in their application to the crime charged. We hold that capital defendants are not entitled to special treatment regarding evidentiary or procedural rules . . . . We will utilize the doctrine of waiver where applicable; yet we must also retain the power to *sua sponte* consider particular errors under exceptional circumstances.

Accordingly, the Court concludes the *Perry* rule is adequate.[16] In reaching this conclusion, the Court observes that the Sixth Circuit recently rejected the very argument now advanced by Esparza. *See Mapes v. Coyle*, 171 F.3d 408, 421 (6th Cir. 1999) ("The cases that [petitioner] claims demonstrate Ohio's wavering commitment to its procedural default rules do not in fact do so."). *See also Scott v. Mitchell*, 209 F.3d 854, 869 (6th Cir. 2000) (rejecting petitioner's claim that Ohio's procedural default rules are too loosely applied to comport with due process); *Byrd v. Collins*, 209 F.3d 486 (6th Cir. 2000) (rejecting petitioner's claim that the *Perry* Rule or the *Cole* Rule was not regularly applied and thus not an adequate and independent state ground for purposes of invoking a procedural bar). A district court within this circuit earlier rejected this argument as well. *See Bueke v. Collins*, No. C1-92-507, at 65 ("Petitioner has not cited a single case holding that a consistently enforced state procedure bar[,] which on some occasions is not invoked for unexplained reasons generally consistent with plain error review[,] should not be enforced in federal habeas corpus.").

b. Ohio's Post-Conviction System Does Not Comport With Due Process Requirements

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State v. Greer, 530 N.E.2d 382, 394 (Ohio 1988).

[16] Esparza attempts to bolster his argument by pointing to several *non-capital* cases in which the courts, on post-conviction review, similarly declined to apply res judicata and considered otherwise barred claims on their merits. For the same reasons explained above, this claim too must fail. *See supra*; *Bueke*, C1-92-507, at 66-67.

Esparza also asserts a broad challenge to the constitutionality of Ohio's post-conviction system, contending that Ohio's post-conviction bar of res judicata does not satisfy due process requirements. According to Esparza, Ohio's post-conviction system is designed to create procedural defaults for the sake of judicial convenience, and provides no meaningful opportunity for petitioners to identify, investigate, or prove constitutional violations. Esparza, however, does not explain precisely what it is about the system that permits this to occur. The thrust of his argument seems to be that Ohio's post-conviction practice makes compliance with its procedural requirements so difficult that petitioners are set up for failure.[17] This argument is unpersuasive.

In support of this argument, Esparza primarily relies on three cases: *Easter v. Endell*, 37 F.3d 1343, 1345 (8th Cir. 1994); *Harmon v. Ryan*, 959 F.2d 1457, 1462 (9th Cir. 1992); and *Kim v. Villalobos*, 799 F.2d 1317, 1321 (9th Cir. 1986). None of these cases supports Esparza's argument that *Ohio's* application of res judicata in post-conviction proceedings violates due process.

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[17] Esparza attempts to bolster his argument that the post-conviction process is inadequate by pointing to the record of its results. Thus, Esparza points out that (1) only one death-sentenced petitioner has ever been granted post-conviction relief by a state trial court; (2) in only eight instances has an Ohio Court of Appeals remanded a post-conviction matter for further review (review which did not result in a grant of relief) and; (3) the Ohio Supreme Court has never granted discretionary review in a capital post-conviction proceeding. These results, as discouraging to petitioner as they might be, do not necessitate the conclusion that the process which produces them is constitutionally infirm, however.

In *Easter*, the petitioner pled guilty to various crimes in an Arkansas state court in December of 1989. At the time, Arkansas did not allow those who pleaded guilty to appeal; in addition, Arkansas had no real post-conviction system in place. A year after Easter's guilty plea and conviction, Arkansas erected a post-conviction procedure (Rule 37) that allowed for the review of guilty pleas. However, petitions containing such challenges were required to be filed within ninety (90) days of judgment. The Arkansas Supreme Court subsequently held that individuals who had pleaded guilty during the period in which Rule 37 was *not* in effect had a right to challenge their guilty pleas under the rule. *Fox v. State*, 832 S.W.2d 244 (Ark. 1992). The Arkansas Supreme Court also said, however, that such challenges still had to be made within the ninety (90) day period. Easter filed a Rule 37 petition, and it was denied as untimely. Easter raised a challenge to his guilty plea on federal habeas review, and the district court held that the claim was procedurally defaulted.

The Eighth Circuit Court of Appeals reversed. The Court held that the *Fox* procedural bar was not adequate *as to Easter*,[18] because it was not a firmly established rule when applied to him.[19] In this case, Esparza has not shown that any

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[18] The Court was careful to point out that "Arkansas' post-conviction procedures as embodied by *Fox* are not *in themselves* constitutionally infirm." *Easter*, 37 F.3d at 1346.

[19] This was an application of the Supreme Court's decision in *Ford v. Georgia*, 498 U.S. 411 (1991) (holding that a state procedural rule which was not clearly defined before the default is not an adequate state ground for purposes of determining procedural default).

of his procedural defaults were due to a procedural rule that was not firmly established at the time it was applied to him.[20]

Harmon also offers no support for Esparza's claims. In *Harmon*, the district court dismissed the petitioner's habeas corpus petition because he had failed to pursue a direct appeal in the Arizona Supreme Court first. The Ninth Circuit reversed, holding, basically, that the Arizona Supreme Court had misled the petitioner about what he needed to do to exhaust his state remedies. The Ninth Circuit held that the petitioner's default was due to the fact that, prior to its occurrence, the Arizona Supreme Court expressly held that "'[o]nce the defendant has been given the appeal to which he has a right [*i.e.*, in the state intermediate appellate court], state remedies have been exhausted.'" *Harmon*, 959 F.2d at 1463 (*quoting State v. Shattuck*, 684 P.2d 154, 157 (Ariz. 1984)). Thus, the Ninth Circuit concluded, in light of *Shattuck*, it was reasonable for an Arizona defendant to believe that an appeal to the Arizona Appeals Court was all that was needed to exhaust his state remedies before pursuing a federal habeas action, and the failure to appeal to the Arizona Supreme Court was excused. Here, Esparza has not pointed to a single decision which misled him about his obligations.

Likewise, *Kim* does not assist Esparza's argument. In *Kim*, the Ninth Circuit held that, where a *pro se* prisoner's failure to plead his claims with particularity resulted in his

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[20] *Pearson v. Norris*, 52 F.3d 740 (8th Cir. 1995), also involved Arkansas Rule 37. In *Pearson*, the Court held that, since any attempt by the petitioner to file an untimely Rule 37 petition would be rejected by the Arkansas courts, the claim should be addressed by the federal district court on the merits.

being unable to pursue post-conviction relief, the procedural default would be excused. Here, there is no such obstacle to Esparza, who was represented by counsel throughout his appeal and post-conviction proceedings.

Other than to complain about the result reached in his case, where virtually all of his post-conviction claims were deemed barred from further review, Esparza has failed to identify how Ohio's post-conviction review process is constitutionally infirm. While the procedure may be strict, and its track-record fairly pitiful, it is not draconian, and certainly does not resemble the Kafkaesque procedural rigamarole condemned by *Bartone v. United States*, 375 U.S. 52, 54 (1963) (per curiam) ("Where state procedural snarls or obstacles preclude an effective state remedy against unconstitutional convictions, federal courts have no other choice but to grant relief in the collateral proceeding."). Accordingly, this argument fails.

c. The Perry Rule Does Not Bar Consideration of Ineffective Assistance of Trial Counsel Claims.

Esparza argues that Ohio has carved out an exception to the *Perry* rule, allowing claims premised on the ineffective assistance of trial counsel to be raised for the first time in post-conviction proceedings. Because so many of Esparza's claims are premised on the alleged ineffectiveness of his trial counsel, the existence, or non-existence, of such an exception is critical to the Court's procedural default analysis.

Unfortunately for Esparza, however, while it is true that an exception to the *Perry* rule does exist for certain ineffectiveness of counsel claims, that exception does not apply to the ineffectiveness of counsel claims in Esparza's petition. The Ohio Supreme Court has made it clear that,

where a petitioner is represented by new counsel on appeal and the ineffectiveness claim is based on facts in the trial record, res judicata will apply to bar that claim if not presented on direct appeal. *See Ohio v. Cole*, 443 N.E.2d 169, 171 (Ohio 1982)(When defendant "upon direct appeal was represented by new counsel. . . and when such question of effective counsel could fairly be determined without examining evidence outside the record, none of the qualifications engrafted on the *Perry* decision is apposite.") *See also Combs v. Coyle*, 205 F.3d 269, 275 (6th Cir. 2000)(*Cole* bars post-conviction ineffective assistance of counsel claims where petitioner had new counsel on direct appeal); *Bueke v. Collins*, slip. op., C1-92-507 at 70 (Ohio "demands that ineffective assistance of counsel claims based on facts of record be presented on direct appeal when the defendant is represented by new counsel on direct appeal"). Because Esparza was represented by new counsel on direct appeal and his claims do not, in most instances, depend on evidence *dehors* the record, Esparza may not avoid application of *Perry* to those claims.

The conclusion that Esparza's ineffective assistance of counsel claims may not escape *Perry* is true, moreover, despite Esparza's citation to *State v. Cooperrider*, 448 N.E.2d 452 (1983). *Cooperrider*, only states the exception to this rule that, when the trial record does not contain sufficient evidence regarding the issue of competency of counsel, an evidentiary hearing is required to determine the allegation and the issue may, then, be raised through the post-conviction remedies of Ohio Rev. Code § 2953.21.[21]

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[21] That federal courts may apply a more lenient procedural bar standard in cases under 28 U.S.C. § 2255 does not change the fact that Ohio's procedural default is an adequate and independent ground to foreclose federal habeas review of certain ineffective assistance of counsel claims. *See Byrd v. Collins*, 209 F.3d 486, 521 (6th Cir. 2000) (holding that *Cole* is an adequate and independent state ground for purposes of invoking a procedural bar to ineffective assistance of trial counsel claims); *but see id.* at 548 (Jones, J., dissenting) (stating that taking into account the Ohio Supreme Court's decision in *Cooperrider* and the Sixth Circuit's recognition of the murkiness of Ohio's procedural framework for presenting ineffective assistance of counsel claims, neither the *Cole* rule, nor the *Murnahan* procedure was sufficiently established and followed to serve as an "adequate" state procedure that could bar a federal habeas court's examination of ineffective assistance of counsel claims).

d. The Perry Rule Does Not Promote a Legitimate State Interest

Finally, Esparza argues that the *Perry* rule cannot be applied to procedurally bar any of his claims because it does not promote a legitimate state interest, relying on *Henry v. Mississippi*, 379 U.S. 443, 447 (1965) (finding that Mississippi's contemporaneous objection rule promotes a legitimate state interest). Esparza cites to several Sixth Circuit decisions in which the judges of that court bemoaned the fact that Ohio's post-conviction procedures had been effectively gutted by *Perry*. Esparza has not, however, cited to this Court a single instance in which the Sixth Circuit has directed district courts to disregard *Perry* entirely. Indeed, a panel of the Sixth Circuit very recently went to great pains to discuss the benefits of contemporaneous objection rule, finding that it served numerous legitimate interests, not the least of which was protecting the finality of jury verdicts. *See Scott v. Mitchell*, 209 F.3d 854, 870-871 (6th Cir. 2000).

Accordingly, petitioner's blanket request that this Court refuse to impose Ohio's procedural bars to his claims is rejected.[22]

2. Procedural Default of Claims Raised In the Context of Ineffective Assistance of Counsel Claims in State Court, But Raised as Independent Claims On Federal Habeas Review

As noted, many of the claims Esparza raises in this action were raised in his state proceedings, not as separate and independent claims for relief, but as components of ineffective assistance of counsel (trial and appellate) claims in his state proceedings. In some instances, the state courts addressed the substance of those underlying claims in order to determine whether Esparza's counsel's failure to raise them at the earliest opportunity for doing so constituted ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). The reason for this is obvious. Under *Strickland*, counsel's conduct will only be deemed constitutionally deficient if *both* of the following are true: (1) counsel's conduct fell below basic standards of assistance, *and* (2) that, but for counsel's professional failures, the result of the trial would likely have been different – *i.e.*, the defendant was prejudiced thereby. If the underlying claim upon which the ineffective assistance of counsel claim is based lacked merit, then Esparza would have suffered no prejudice from his counsel's failure to raise it,

[22] Esparza also argues that he can establish cause and prejudice for any of his procedural defaults. Whether Esparza has established cause and prejudice for any defaults will be addressed in the context of Esparza's individual claims.

and no constitutional violation could be established.[23] Thus, the Court's analysis of the underlying claim served to *inform* its resolution of Esparza's ineffective assistance of counsel claim. The fact that the state courts engaged in that analysis, as they must under *Strickland*, does not, as Esparza contends, serve as evidence that those courts *excused* the procedural default. To hold otherwise would eviscerate the continued vitality of the procedural default rule; every procedural default could be avoided, and federal court merits review guaranteed, by claims that every act giving rise to every procedural default was the result of constitutionally ineffective counsel.

As the Sixth Circuit recently stated in *Mapes v. Coyle*:

> Since the central issue before us is whether, as the federal district court found, Mapes's appellate counsel was constitutionally ineffective for failing to raise several alleged trial errors, we must first determine whether the trial court in fact erred. If it did not, there can be no constitutional deficiency in appellate counsel's failure to raise meritless issues. If the trial court did err, the questions then become whether appellate counsel was constitutionally ineffective for failing to raise those errors on appeal and, if

[23] For example, in the case of an ineffective assistance of trial counsel claim premised on trial counsel's failure to file a motion to suppress an allegedly overly suggestive pre-trial identification, a determination that the pre-trial identification was *not* overly suggestive would preclude a finding that counsel's performance was constitutionally deficient.

> so, whether the petitioner was prejudiced by counsel's unsatisfactory representation. We shall address those questions in due course, but we must, of course, first examine Mapes's allegations of error, even though, on their own merits, they may be defaulted.

171 F.3d 408, 413 (6th Cir. 1999). As *Mapes* suggests, an analysis of a particular claim for purposes of determining whether counsel's failure to assert that claim at trial or on appeal was ineffective is independent of whether the underlying claim would itself be procedurally defaulted if asserted as a discrete claim. Accordingly, to the extent Esparza asserts claims here that were only asserted *as part of* an ineffective assistance of counsel claim during state court proceedings, and were only considered in that context, those claims are deemed to be procedurally defaulted, notwithstanding evidence that the state courts touched on the substance of those claims. *Cf. Scott v. Mitchell*, 209 F.3d at 865-868 (rejecting rule in *Knuckles v. Rogers*, No. 92-3208, 1993 WL 11874 (6th Cir. Jan. 21, 1993) and holding that a state court's plain error review does not excuse procedural default). The Court will, of course, address the substance of such claims in the context of Esparza's ineffective assistance of counsel claims, or in the context of a claim that the procedural default should be excused under a cause and prejudice standard, if appropriate, but that consideration is not the same as a merits review of those claims.

VII. INDIVIDUAL GROUNDS FOR RELIEF

Esparza's claims fall into five broad categories: (1) constitutional violations which tainted the entire course of the state proceedings; (2) constitutional violations relating to the guilt phase and conviction; (3) constitutional violations relating to the mitigation phase and sentencing; (4)

constitutional violations relating to Esparza's appeals; and (5) systemic challenges to Ohio's capital punishment scheme in general.

A. Constitutional violations which tainted the entire course of the state proceedings

1. Sixth Claim for Relief

In his sixth claim, Esparza contends that Hispanics were under-represented in both his grand and petit jury venires, in violation of his constitutional rights. This claim was raised in Esparza's direct appeal and was considered on the merits by both the Ohio Court of Appeals and Ohio Supreme Court. Thus, it is not procedurally defaulted and the Court may consider it on the merits.

A petit jury venire must represent a "fair cross section of the community." *Holland v. Illinois*, 493 U.S. 474, 480 (1990); *Taylor v. Louisiana*, 419 U.S. 522, 528-29 (1975). To establish a prima facie violation of the fair cross-section requirement, the petitioner must show that (1) the group which allegedly was excluded is a distinctive group in the community; (2) the representation of this group in venires is not reasonable when compared to the number of such persons in the community; and (3) the under-representation is due to a systematic exclusion of the group in the jury selection process. *Duren v. Missouri*, 439 U.S. 357, 367-68 (1979).

Applying this constitutional test, both the Ohio Court of Appeals and the Ohio Supreme Court, on direct appeal, rejected this claim. According to the Ohio Court of Appeals:

> We find that appellant has failed to show [prongs] (2) and (3). Appellant cites a political and demographic profile of Hispanics

in Toledo, but fails to correlate these findings to Hispanic representation on juries in Toledo or show how it is unfair and unreasonable in relation to the number of such persons in the community. As far as the third prong is concerned, the under-representation is not due to the systematic or intentional exclusion of Hispanics. The percentage of Hispanic representation in jury pools depends in part on how many Hispanics register to vote. It is within this group's power to control their eligibility for jury duty.

> "[T]he use of voter-registration lists as the source of names of prospective jurors is not unlawful even though it results in the exclusion of nonvoters."

Esparza, 1986 WL 9101, at *22 (*quoting State v. Strodes*, 357 N.E.2d 375 (Ohio 1976), *vacated on other grounds*, 438 U.S. 911 (1978)) (alteration in original).[24] The Ohio Supreme Court also agreed, stating: "Appellant has demonstrated neither an unfair representation of Hispanics on Lucas County juries, nor that such alleged under-representation resulted from a systematic exclusion by the state of that group." *Esparza*, 529 N.E.2d at 197-98 (*citing State v. Puente*, 431 N.E.2d 987 (Ohio 1982); *Duren v. Missouri*, 439 U.S. 357 (1979)).

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[24] It is well-established that those who are non-voters, or, more precisely, those who are not registered to vote, do not comprise a distinctive group for purposes of the fair cross-section inquiry. *See Silagy v. Peters*, 905 F.2d 986, 1010 (11th Cir. 1990); *United States v. Afflerbach*, 754 F.2d 866, 869-80 (10th Cir. 1985).

It is true that Hispanics are a distinctive group and courts have specifically so found. *United States v. Cannady*, 54 F.3d 544, 547 (9th Cir. 1995). It is equally true that those who do not register to vote are *not* a distinctive group, as explained above. The Court concludes that the decisions of the Ohio Court of Appeals and Ohio Supreme Court were not unreasonable applications of clearly established federal law. Esparza has presented no evidence suggesting either that the representation of Hispanics in venires is unreasonable, or that any under-representation that exists is the result of a systematic exclusion of Hispanics in the jury selection process. Accordingly, Esparza's sixth claim for relief is without merit.

2. Esparza's Eighth and Ninth Claims for Relief

Esparza's eighth claim for relief is that his constitutional rights were violated when the trial court "secured a promise" from each juror that he or she could vote to impose the death penalty. This claim is based on the following question posed to the venire by the trial court:

> But the question is, if you were selected as a member of a jury, and because of a finding of that jury, you might later be asked to consider the death penalty, are there circumstances that you can foresee that would preclude or prevent you for [sic] following the Judge's instructions and fairly considering the possibility of the imposition of the death penalty in a case?

This claim was not raised in Esparza's direct appeal. Esparza's ninth claim is that the prosecutor unconstitutionally

excluded all prospective jurors who were opposed to, or had reservations about, the death penalty. Esparza did not object to this during voir dire. The ninth claim was asserted in Esparza's direct appeal, and, although the Court of Appeals noted that Esparza failed to assert it below, both it and the Ohio Supreme Court addressed the claim on its merits, thus permitting this Court to do so as well.[25] Because the eighth and ninth claims are resolved on the basis of the same legal principles, and a resolution of one resolves both, the Court will discuss the merits of these claims, despite the procedural default as to at least one of them.

Esparza's argument appears to be that a "death qualified" jury is an unconstitutionally comprised jury. A "death qualified jury" is a jury made up of jurors who are not opposed to the death penalty and indicate that they would consider imposing the death penalty upon conviction. *Witherspoon v. Illinois*, 391 U.S. 510 (1968). In *Witherspoon* and its progeny, the Supreme Court has made clear that a "death qualified jury" is constitutional, so long as the jurors are willing "to consider all of the penalties provided by state law," including the death penalty. *Id.* at 522 n.21. *See Lockhart v. McCree*, 476 U.S. 162 (1986); *Wainwright v. Witt*, 469 U.S. 412 (1985). *See also Byrd v. Collins*, 209 F.3d 486, 528 (6th Cir. 2000); *United States v. Villarreal*, 963 F.2d 725, 728-29 (5th Cir. 1992); *Brown v. Dixon*, 891 F.2d 490, 497 (4th Cir. 1989).

The Ohio Supreme Court cogently analyzed, and rejected, this claim:

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[25] These claims were not merely assessed under a "plain error" standard, which would not, as noted above, excuse the procedural default under *Scott*.

In his ninth proposition of law, appellant argues the state unconstitutionally exercised its peremptory challenges to remove six prospective jurors who were generally opposed to, or expressed reservations concerning, the death penalty. No objection was made during trial on this issue, which was raised for the first time on appeal. [Citation omitted.] Notwithstanding the resulting waiver of this issue, however, we find no merit to appellant's arguments.

It is well-established that the Equal Protection Clause forbids the state's use of peremptory challenges to purposefully exclude "any identifiable group in the community which may be the subject of prejudice." *Swain v. Alabama* (1965), 380 U.S. 202, 205, 85 S.Ct. 824, 827, 13 L. Ed. 2d 759; *Hernandez v. Texas* (1954), 347 U.S. 475, 74 S.Ct. 667, 98 L. Ed. 866; *Avery v. Georgia* (!953), 345 U.S. 559, 73 S.Ct. 891, 97 L.Ed. 1244; *Batson v. Kentucky* (1986), 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed. 2d 69. However, the prosecutor is entitled in any given case to a presumption that he "is using the State's challenges to obtain a fair and impartial jury to try the case before the court," *Swain*, supra, 380 U.S. at 222, 85 S.Ct. at 837, which may be rebutted by establishing the prosecutor's peremptory challenges resulted in systematic exclusion of such identifiable group from jury panels. *Swain, supra*, at 224, 85 S.Ct. at 838; *see, also, Batson, supra*, 476 U.S. at 87-88, 106 S.Ct. at 1717-18. In *Lockhart v. McCree* (1986), 476 U.S. 162, 176-177, 106 S.Ct.

1758, 1766-67, 90 L. Ed. 2d 137, the United States Supreme Court held that prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors in a capital case, *i.e.*, "Witherspoon-excludables," are not distinctive, identifiable groups for the requirement that a jury represent a fair cross-section of the community. The Court thus upheld the practice of "death qualifying" a jury. If those persons who unequivocally oppose the death penalty do not constitute an "identifiable group" for fair cross-section purposes, even less so do those persons, like the six jurors identified by appellant here, who have some reservations and concerns about the death penalty but state that they are able to put those feelings aside and follow the instructions of the trial court. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Swain*, *supra*, 380 U.S. at 220, 85 S.Ct. at 835. "'[I]t must be exercised with full freedom, or it fails at its full purpose.'" *Lewis v. United States* (1892), 146 U.S. 370, 378, 13 S.Ct. 136, 139, 36 L.Ed. 1011. Appellant's ninth proposition of law is not well-taken.

The Ohio Supreme Court's decision was not contrary to clearly established federal law. Accordingly, claims eight and nine lack merit.

3. Tenth Claim for Relief

Esparza's tenth claim for relief is that the exposure of prospective jurors to information from the media about his case deprived him of his constitutional rights. This claim is based on the following facts: one of the prospective jurors admitted that she had listened to a radio broadcast concerning Esparza's case *after* she was told to avoid media coverage; and another prospective juror stated that she had discussed the case with other prospective jurors while waiting. Esparza complains that the trial court did not make further inquiry of these prospective jurors after learning this information, and that this failure to make further inquiry violated Esparza's right to a fair trial. Neither prospective juror was ultimately selected to sit as a juror, so Esparza's argument seems to be that these improprieties infected the other members of the venire, and that the court should have questioned the other members to ensure that they had not been prejudiced by these improprieties.

This claim apparently was raised for the first time during Esparza's delayed motion for reconsideration. Esparza's counsel did not object at the time of trial, nor did Esparza's appellate counsel raise it in the course of Esparza's direct appeal. Rather, it was asserted as part of an ineffective assistance of appellate counsel claim – *i.e.*, appellate counsel was ineffective for failing to assert that trial counsel was ineffective for failing to move for a mistrial after the trial court's failure to make further inquiry. It is, thus, procedurally defaulted as a discrete claim. It may only be considered in the context of an ineffective assistance of appellate counsel claim, as made clear in *Mapes*, and as discussed *supra*, at Part VI.B.2, pp. 30-31.

The test for evaluating ineffective assistance of counsel claims was developed and set forth in *Strickland* and has been previously set forth in this opinion. Briefly, in

Strickland, the United States Supreme Court held that a petitioner must demonstrate "cause" and "prejudice" to prevail on an ineffective assistance of counsel claim. To demonstrate cause, the petitioner must show "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. "The objective standard of reasonableness is 'highly deferential' and includes a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Skaggs*, 27 F.Supp.2d 952, 967 (1988) (*citing Strickland*, 466 U.S. at 688, 689). Under this standard, "[t]he assistance required of counsel is not that of the most astute counsel, but rather that of 'reasonably effective assistance.'" *Id.*

A defendant is entitled to effective assistance of counsel in his first appeal as a matter of right. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Attorney error may constitute cause for failure to comply with a procedural rule if it constitutes ineffective assistance of counsel under *Strickland*. *See, e.g., Rust v. Zent*, 17 F.3d 155, 161 (6th Cir. 1994); *Ritchie v. Eberhart*, 11 F.3d 587, 591 (6th Cir. 1993). The two-part test enunciated in *Strickland*, discussed above, is, thus, applicable to claims of ineffective assistance of appellate counsel: Esparza must show that his appellate counsel's performance was deficient, and that the deficient performance so prejudiced the defense that the appellate proceedings were unfair and the result unreliable. *Strickland*, 466 U.S. at 687. An appellant has no constitutional right to have every non-frivolous issue raised on appeal, *Jones v. Barnes*, 463 U.S. 745, 750-54 (1983), and tactical choices regarding issues to raise on appeal are properly left to the sound professional judgment of counsel. *United States v. Perry*, 908 F.2d 56, 59 (6th Cir. 1990), *cert. denied*, 498 U.S. 1002 (1990). Indeed,

> [m]ost cases present only one, two, or three significant questions . . . . Usually, . . . if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.

Jones, 463 U.S. at 752 (*quoting* R. Stern, *Appellate Practice in the United States* 266 (1981)). Moreover, an attorney is not required to present an argument on appeal for which there is no good-faith factual support in order to avoid a charge of ineffective representation. *Krist v. Foltz*, 804 F.2d 944, 946-47 (6th Cir. 1986).

To establish prejudice generally, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* To satisfy this showing, the petitioner must show that his counsel's blunders "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686. In the context of an ineffective assistance of *appellate* counsel claim, a petitioner must show "that the direct appeal of [those] issue[s] [that appellate counsel did not raise] would likely have been successful." *Leggett v. United States*, 1996 WL 665580, at *2 (6th Cir. Nov. 14, 1996).

This claim clearly would fail under the prejudice prong. In cases involving pretrial publicity, "the relevant question is not whether the community remembered the case,

but whether the jurors . . . had such fixed opinions that they could not judge impartially the guilt of the defendant." *Patton v. Yount*, 467 U.S. 1025, 1035 (1984). "It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Most recently, the United States Supreme Court has emphasized that there is no *per se constitutional* requirement that a court specifically inquire about the content of any pre-trial publicity that might have been viewed by potential jurors:

> Although precise inquiries about the contents of any news reports that a potential juror has read might reveal a sense of the juror's general outlook on life that would be of some use in exercising peremptory challenges, this benefit cannot be a basis for making "content" questions about pretrial publicity a constitutional requirement, since peremptory challenges are not required by the Constitution. *Ross v. Oklahoma*, 487 U.S. 81, 88, 108 S.Ct. 2273, 2278, 101 L. Ed. 2d 80. Moreover, although content questions might be helpful in assessing whether a juror is impartial, such questions are constitutionally compelled only if the trial court's failure to ask them renders the defendant's trial fundamentally unfair. *See Murphy v. Florida*, 421 U.S. 794, 799, 95 S.Ct. 2031, 2036, 44 L. Ed. 2d 589. Furthermore, contrary to the situation in *Aldridge*, *supra*, 283 U.S., at 311-313, 51 S.Ct., at 471-72, there is no judicial consensus, or even weight of authority, favoring Mu'Min's position. Even the Federal Courts of Appeals that have required content inquiries have not expressly done so on constitutional grounds.

Mu'Min v. Virginia, 500 U.S. 415, 416 (1991).

In its consideration of Esparza's claim, the Ohio Court of Appeals, after reviewing a transcript of the voir dire, concluded that there was nothing to suggest that other members of the venire had been affected by exposure to pretrial publicity or improper discussions about the case among the venire:

> A review of the transcript of the voir dire proceedings in this case reveals that the lower court ascertained from each of the jurors impaneled that he or she could set aside any preconceived notions of the case and base the verdict on the evidence presented at trial. As such, appellant's eleventh assignment of error fails to raise any substantive grounds for relief.

Esparza, 1994 WL 395114, at *11.

The Ohio Court of Appeals did not expressly rely on federal law in reaching this decision.[26] Its decision, however, was entirely consistent with, indeed, compelled by, controlling federal constitutional law. As the Sixth Circuit recently held:

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[26] The Ohio Court of Appeals relied on *State v. Booher*, 560 N.E.2d 786, 799 (Ohio 1988). *Booher* held that "[i]t is not error to impanel a jury who has been exposed to pretrial publicity when they state that they can be fair and impartial and base their verdict on the evidence that is presented at trial." *Id.*

> Because this case did not involve a televised confession as in *Rideau* or the carnival atmosphere displayed in *Estes* and *Sheppard*, the clearly established law [this Court] must apply here is that of *Irvin*, where the question was whether 'adverse pretrial publicity . . . create[d] such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed.

Nevers, 169 F.3d at 365.[27] This case likewise did not involve a televised confession or anything approaching a carnival atmosphere. Thus, the Ohio Court of Appeals applied the correct standard, *Irvin*, and correctly applied that standard to the facts of Esparza's case. Accordingly, the Ohio Court of Appeals' application of federal law was not unreasonable.

B. Constitutional Violations Relating to the Guilt Phase and Conviction

1. Second Claim for Relief

Esparza's second claim for relief is that the State of Ohio improperly used an informant to solicit information from him *after* his right to counsel had attached, in violation of his constitutional rights. At trial, Albert Richardson, Esparza's former cellmate at the Lucas County Jail, was called to testify by the State. Richardson testified that Esparza told him he had robbed the convenience store and shot and killed Melanie Gerschultz.

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[27] The references are to *Sheppard v. Maxwell*, 384 U.S. 333 (1966); *Estes v. Texas*, 381 U.S. 532 (1965); *Rideau v. Louisiana*, 373 U.S. 723 (1963).

Esparza claims that Richardson was working as a government informant at the time of these conversations. Esparza's claim is based on the fact that, following an initial conversation with Esparza, Richardson contacted the "CrimeStopper" program, a privately funded program that pays individuals who provide information used to solve crimes, and told them he had information; at trial, Richardson denied that he contacted the CrimeStopper program, insisting that he contacted the Toledo Police Department directly. Richardson subsequently had other conversations with Esparza, and also met privately with Detective Marx, of the Toledo Police Department.

This claim was not raised until Esparza's successor post-conviction proceeding. It is not, however, procedurally defaulted. This claim is premised on information that was not made available to Esparza until after the conclusion of his direct appeals, pursuant to his public records litigation based on *State ex rel. Clark v. City of Toledo*, 560 N.E.2d 1313 (Ohio 1990), and, hence, is premised on matters *dehors* the record. Accordingly, the Court will address this claim on the merits, as did the state courts.

Esparza argues this claim as though it arises under the Fifth Amendment principles of *Miranda v. Arizona*, 384 U.S. 436 (1966). It is clear, however, that this claim is, or must be, cognizable under the Sixth Amendment right to counsel, or not at all. This is true because *Miranda* only applies to custodial interrogations by law enforcement officers or those acting at their direction. While Esparza was jailed (on an unrelated matter) during these discussions, he was free to refuse to talk to Richardson or move away from him at any time. There was, accordingly, no "custody" element to this

interaction.[28] The Court will analyze this claim, therefore, as one asserted under the Sixth Amendment and *Massiah v. United States*, 377 U.S. 201 (1964), not as one under the Fifth Amendment or *Miranda*. So analyzed, it is clearly without merit.

The Sixth Amendment does not forbid admission "of an accused's statements to a jailhouse informant who was placed in close proximity but [made] no effort to stimulate conversations about the crime charged." *Kuhlmann v. Wilson*, 477 U.S. 436, 456 (1986). Esparza has not presented any evidence to show that Richardson stimulated the conversations, or to show, for that matter, that he told Richardson about his involvement in the crime at any time after Richardson contacted a third party regarding Esparza. Esparza merely asserts that Richardson chose, after the fact, to share the information he acquired with law enforcement. Where there is no evidence that Richardson induced Esparza to speak or did so at the prompting of some governmental official or entity, that claim cannot succeed.

2. Esparza's Third Claim for Relief

Esparza's third ground for relief is that the prosecutor failed to provide him with exculpatory evidence, in violation of his constitutional rights. Specifically, Esparza alleges that the prosecutor failed to provide evidence that: (1) would impeach the trial testimony of James Barrailloux and Lisa Esparza; (2) implicates other suspects in the Island Carryout

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[28] *United States v. Mathis*, 391 U.S. 1 (1968) even if considered controlling law, is not to the contrary. The relevant inquiry is whether the questioner had placed or was affiliated with those placing the defendant in custody. Richardson clearly does not fall into that category.

murder; (3) indicates Esparza was intoxicated during the time the murder was committed and that he suffered from a mental disorder.

Although this claim was not raised on direct appeal, like Esparza's second claim for relief, it is not procedurally defaulted as it also is premised on information that was not made available to Esparza until after the conclusion of his direct appeals, pursuant to his litigation based on *State ex rel. Clark v. City of Toledo*, 560 N.E.2d 1313 (Ohio 1990). Accordingly, the Court also will address this claim on the merits, without the benefit of a state court decision.

To establish a claim under *Brady v. Maryland*, 373 U.S. 83 (1963), "the petitioner has the burden of establishing that the prosecutor suppressed evidence; that such evidence was favorable to the defense; and that the suppressed evidence was material." *See Carter v. Bell*, 218 F.3d 581, 2000 WL 895827, *19 (6th Cir. July 7, 2000) (*citing Moore v. Illinois*, 408 U.S. 786, 794-95 (1972)). "The inquiry is objective, independent of the intent of the prosecutors." *Id.* (*citing Brady*, 373 U.S. at 87).

"[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A 'reasonable probability' is a probability sufficient to undermine confidence in the outcome." *United States v. Bagley*, 473 U.S. 667, 676 (1985). There is no *Brady* violation "where a defendant knew or should have known the essential facts permitting him to take advantage of any exculpatory information, or where the evidence is available . . . from another source, because in such cases there is really nothing for the government to disclose." *Coe v. Bell*, 161 F.3d 320, 344 (6th Cir. 1998), *cert. denied*, –

U.S. – , 120 S. Ct. 110 (1999) (citations omitted) (internal quotation marks omitted).

Recently, the Supreme Court expounded on the prejudice or "reasonable probability" prong of *Brady*. In *Strickler v. Greene*, 527 U.S.263, 296 (1999), the Court found that, although the prosecutor had violated the first two prongs of *Brady* by failing to provide exculpatory material to the defense, the petitioner did not sufficiently demonstrate that "there [was] a reasonable probability that his conviction or sentence would have been different had these materials been disclosed." In that case, the principal witness positively identified the petitioner during trial. In fact, she provided specifics of petitioner's abduction of the victim and how she was able to remember such detail. *Id.* at 272. Upon obtaining the interviewing detective's handwritten notes from initial interviews with the witness, however, her credibility was undercut significantly. The Court determined that, even if the witness's testimony had been impeached entirely, there was ample other evidence to convict, and, thus, provide the Court with sufficient assurance that the wrongfully excluded evidence would not have upset the trial's outcome. *Id.* at 296.

It is here that Esparza's first two sub-claims also must fail. Were the Court to extricate James Barrailloux and Lisa Esparza's testimony from the totality of the evidence offered at trial, there nonetheless would be ample evidence remaining to provide the Court with confidence in the trial's outcome. Richardson's testimony, for example, provided the jury with Esparza's confession of the killing. Furthermore, a jury reasonably could have found that, although other suspects were investigated for this homicide, Esparza was the actual assailant.

Esparza's claims of exculpatory evidence revealing that he was intoxicated on the evening of the Island Carryout murder and his mental dysfunction fail because that information was not solely under the State's control. Esparza, more so than the prosecution, would have knowledge of his intoxication on the night of the offense and of prior mental evaluations. Accordingly, the Court finds Esparza's third claim to be without merit.

3. Esparza's Fourth and Fifth Claims for Relief

Esparza's fourth and fifth claims for relief are based on his allegation that the prosecutor threatened Lisa Esparza and improperly told witnesses that they could not speak with defense counsel, and that this served to prevent his counsel from conducting an adequate investigation into the case. Respondent does not contend that these matters are procedurally barred from review by this Court.

During the evidentiary hearing before this Court, Lisa Esparza testified that the then-prosecutor, Ruth Ann Franks, and the police department threatened to take away her children if she did not testify against Esparza. Judge Franks testified and denied the allegation, explaining that she merely told Ms. Esparza, as she told all witnesses, that she was to testify truthfully. Judge Franks further testified that she never instructed witnesses *not* to talk with defense counsel. Rather, she stated that, as a prosecutor, she told witnesses that they are free to talk to whomever they please, and are equally free to refuse to speak with anyone with whom they do not wish to speak. For various reasons, the Court does not credit the testimony of Lisa Esparza and finds the contrary

testimony of Judge Franks to be credible.[29] Thus, Esparza's fourth and fifth claims for relief are rejected because they are not supported by credible evidence.

4. Esparza's Seventh Claim for Relief

In his Seventh Claim for Relief, Esparza asserts that his Eighth and Fourteenth Amendment rights were violated when the trial court failed to recuse itself after conducting a witness certification hearing pursuant to Ohio R. Crim. P. 16(B)(1)(e).[30] This rule states in relevant part:

Discovery and Inspection

***

(B) **Disclosure of evidence by the prosecuting attorney**

(1) *Information subject to disclosure.*

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[29] Applying standard tests to assess the credibility of witnesses the Court finds that the demeanor of Ms. Esparza on the witness stand, the timing of her disclosure, certain inconsistencies in her testimony (both internal and with respect to other descriptions of the government's alleged improprieties) and her relationship with the defendant all negatively impacted her credibility.

[30] Respondent makes no allegation that this claim is procedurally defaulted. Therefore, the Court will address this claim on the merits.

(e) Witness names and addresses; record. Upon motion of the defendant, the court shall order the prosecuting attorney to furnish to the defendant a written list of the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney. Names and addresses of witnesses shall not be subject to disclosure if the prosecuting attorney certifies to the court that to do so may subject the witness or others to physical or substantial economic harm or coercion. Where a motion for discovery of the names and addresses of witnesses has been made by a defendant, the prosecuting attorney may move the court to perpetuate the testimony of such witnesses in a hearing before the court, in which hearing the defendant shall have the right of cross-examination. A record of the witness' testimony shall be made and shall be admissible at trial as part of the state's case

> in chief, in the event the witness has become unavailable through no fault of the state.

Ohio R. Crim. P. 16(B)(1)(e).

Prior to Esparza's trial, the Prosecutor sought a Rule 16(B)(1)(e) hearing regarding the testimony of Catherine B. Stegg, Esparza's girlfriend and mother of his son. During this hearing, over which the trial judge presided, the State proffered that Stegg was afraid to testify against Esparza and a "family member" because she feared physical repercussions to either herself or her child. To justify these fears, the State introduced Esparza's prior criminal record and an alleged incident in which Esparza threatened Toledo police officers while in custody. Further, the State noted that it was defendant's brother, Peter Esparza whom Stegg feared. Esparza now claims that, because the trial court conducted this hearing, prejudice against himself and his brother arose thereby, and he should be afforded relief.

The Ohio Supreme Court has instructed that "when the State seeks to obtain relief from discovery or to perpetuate testimony under Criminal Rule 16(B)(1)(e), the judge who disposes of such a motion may not be the same judge who will conduct the trial." *State v. Gillard*, 533 N.E.2d 272, 274 (Ohio 1988), *cert. denied*, 492 U.S. 925 (1989). Upon examining this claim in the context of Esparza's *Murnahan* petition, the Ohio Court of Appeals found that, although the court should not have presided over both the Rule (16)(B)(1)(e) hearing and the trial, this error was harmless:

> It was therefore error for Judge Riley to preside over both the certification hearing

> and the trial below, and original trial . . . . The court in *Gillard*, however, ... held that a violation of rule [requiring separate judges to preside over the hearing and trial] is not *per se* prejudicial. Rather, the appellant must establish that but for the error, the outcome of the case would have been different.

Upon review of the entire record in this case, we conclude that the error below was harmless . . . . In particular, we note that the evidence to which Judge Riley was exposed at the certification hearing, *i.e.*, appellant's history of violent behavior, was also admitted at the penalty phase of the trial below. In response to appellant's assertion that the certification hearing evidence prejudiced the judge against Peter Esparza, a witness at the trial below, the record reveals that although the prosecutor argued that Peter Esparza had a criminal record and that Stegg had reason to fear him, Peter Esparza's record was submitted to the court and only revealed convictions for traffic violations.

State v. Esparza, App. No. L-84-225, 1995 WL 302302, at *3 (Ohio Ct. App. May 19, 1995).

Pure errors of state law cannot justify habeas relief; only trial defects that rise to the level of a federal constitutional violation can support such extraordinary relief. To succeed on his claim, petitioner must establish that a violation of the constitution, laws or treaties of the United States occurred. 28 U.S.C. §2241; *Pulley v. Harris*, 465 U.S. 37, 41 (1984). Thus, the Court need not assess the wisdom of Criminal Rule 16 or the state court's findings that it was

violated in this case, and must examine, instead, the scope of the alleged prejudice resulting therefrom to determine whether Esparza has been denied his right to due process under the United States Constitution.

Esparza propounds that, because the trial court also presided over the Rule 16(B)(1)(e) hearing, "structural" constitutional error resulted. Most constitutional errors are non-structural, and, thus, are subject to harmless error review. *See Neder v. United States*, 527 U.S. 1, 7 (1999)(*citing Arizona v. Fulminante*, 499 U.S. 279, 306-307 (1991) (collecting cases)). A limited class of errors, however, are structural and can never be held harmless, no matter what the evidence is of the defendant's guilt. *See Johnson v. United States*, 520 U.S. 461, 468 (1997) (*citing Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge); *Vasquez v. Hillary*, 474 U.S. 254 (1984) (racial discrimination in selection of a grand jury); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial); *Waller v. Georgia*, 467 U.S. 39 (1983) (defective reasonable doubt instruction)). A structural error is a "defect affecting the framework within which the trial proceeds, rather than simply an error in the trial process itself," *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991).

The Court declines to place the Rule 16 violation in this ilk. Although the trial court erroneously presided over the hearing, the appellate court correctly noted that much of the evidence that was introduced at that hearing also was introduced during the sentencing phase of the trial. Additionally, while the trial judge in Ohio is the final arbiter of whether the defendant will receive the death penalty under Ohio Rev. Code § 2929.04, it is the jury who initially determines guilt and recommends the death sentence to the trial court. Here, the jury weighed the facts presented in

evidence during both the guilt and mitigation stages of the trial and convicted and sentenced the petitioner. It is upon the jury's recommendation that the trial judge then acts; in the absence of a jury recommendation, the death sentence is not an option for a trial judge. Thus, while a trial judge's role in a capital proceeding remains significant by virtue of his power to refuse to honor a jury's death recommendation, that role is still a limited one. Finally, Esparza characterizes this error as "structural" without case law to support this assertion. Although the petitioner avows this error "cannot be characterized in any other way," the Court finds this hollow assertion unpersuasive. Consequently, Esparza's seventh claim for relief is not well-taken.

5. Esparza's Ineffective Assistance of Counsel During Pre-trial and Trial Claims: Claims 11, 13, 14, 15, 16, 17 and 19

Claims number 11, 13, 14, 15, 16, 17, and 19 all allege ineffective assistance of trial counsel during the voir dire and guilt phase of the trial and will be treated simultaneously. All these claims are subject to a consideration of procedural default as they were not raised during Esparza's direct appeal. As such, Esparza must demonstrate cause and prejudice before the procedural default may be excused. Some of these claims were raised and addressed, however, in Esparza's *Murnahan* petition, where the issue presented was whether *appellate* counsel was inadequate because he failed to present certain of these alleged trial errors to the Court of Appeals in a timely fashion. Thus, the Court finds that claims 13 and 19 (2)(3) and (4) are procedurally defaulted as they were never raised in *any* state court proceeding and because Esparza cannot

show prejudice by virtue of that failure.[31] Because Esparza was not prejudiced by any of the trial errors asserted in the

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[31] Esparza can show no prejudice because none of these claims are meritorious.

Esparza's thirteenth claim for relief is that the prosecution's suppression of exculpatory evidence *caused* trial counsel's ineffectiveness in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). These claims are essentially identical to Esparza's third claim for relief. Because the Court finds no constitutional violation pursuant to *Brady*, the Court subsequently determines that this claim fails under the prejudice prong of *Strickland*. Thus, Esparza's thirteenth claim for relief is not well-taken.

The defaulted sub-claims in Esparza's nineteenth claim for relief allege that counsel's performance was deficient because counsel failed to object to: (1) unduly suggestive pretrial identification procedures; (2) testimony concerning the alarm system; and, (3) the testimony of Lisa Esparza. The Court finds these sub-claims lack merit. In sub-claim two, Esparza contends that counsel was ineffective for failing to object to the pre-trial identification procedures employed by the state. During pre-trial identification, the state displayed only Esparza's photograph to witnesses to identify Melanie Gerschultz's assailant. Esparza asserts this process was prejudicial because only he could be identified by this procedure, as indeed he was.

An alleged violation of petitioner's due process rights by virtue of a pretrial identification must withstand a two-part test. First, the petitioner must establish that the procedure was unduly suggestive. *Thigpen v. Cory*, 804 F.2d 893, 895 (6th Cir. 1986), *cert. denied*, 482 U.S. 918 (1987). If so, the court must evaluate the "totality of the circumstances to determine whether the identification was

reliable, despite the unduly suggestive nature of the identification procedure." *Id.* As the Sixth Circuit has held, "[i]t is the likelihood of misidentification that violates the defendant's due process right." *Ledbetter v. Edwards*, 35 F.3d 1062, 1070 (6th Cir. 1994), *cert. denied*, 515 U.S. 1145 (1995)(*citing Neil v. Biggers*, 409 U.S. 188, 198 (1972)). The Court looks to "the reliability of the identification in determining its admissibility; if an identification is reliable, it will be admissible even if the confrontation procedure was suggestive." *Carter v. Bell*, 218 F.3d 581, 605 (6th Cir. 2000). "The due process concern is heightened[, however,] when that misidentification is possible because the witness is called upon to identify a stranger whom she has observed only briefly, under poor conditions, and at a time of extreme emotional stress and excitement." *Ledbetter*, 35 F.3d at 1070 (*citing Manson v. Brathwaite*, 432 U.S. 98, 112 (1977))(other citations omitted).

In determining the reliability of the identification a court is to examine the following five factors:

> (1) the opportunity of the witness to view the criminal at the time of the crime; (2) the witness's [sic] degree of attention at the time of the observation; (3) the accuracy of the witness's [sic] prior description of the criminal; (4) the level of certainty demonstrated by the witness when confronting the defendant; and (5) the length of time between the crime and the confrontation.

Id. at 1071 (citation omitted).

The Court finds it impossible to apply this test to Esparza's allegations because the Petition alleges use of improper identification procedures but does not provide the

Court specific instances in which the police department utilized this procedure and or explain how it impeded counsel's performance. The Traverse adds no further insight into use of these identification techniques, moreover. If these methods were *only* employed with Lisa Esparza, for instance, or were used with witnesses who had already provided detailed descriptions of Esparza, no defect could be found. Because Esparza provides no factual basis to support this claim, it is without merit.

Sub-claim three is equally without merit. In that sub-claim, Esparza asserts that counsel was deficient for failing to object to the testimony and prosecutorial commentary that Melanie Gerschultz initiated the alarm system, provoking Esparza to retaliate by shooting her. The underlying substantive claim is addressed elsewhere in this Opinion, *infra*, p. 65-66 part VI-B-9. Because that claim lacks merit, Esparza's assertion in an ineffective assistance of counsel framework also must fail under the prejudice prong of *Strickland*.

Finally, sub-claim four, that trial counsel's failure to object to portions of Lisa Esparza's testimony constitutes ineffective assistance of counsel is equally meritless. While Lisa Esparza's fear of repercussion from revealing to authorities that her brother had implicated himself in the Gerschultz murder does not portray Esparza in a most favorable light, these objectionable portions of her testimony do not undermine the reliability and fairness of the proceeding as *Strickland* requires to implicate a Sixth Amendment violation. Lisa Esparza's fears likely would have been evident to the jury even in the absence of direct testimony on them. Thus, although trial counsel's performance may have been deficient, "his performance did not undermine confidence in the outcome of [the] trial as

remaining claims, the Court finds those claims are not well-taken, whether considered direct claims or ineffective assistance of appellate counsel claims.

As stated above, a petitioner must demonstrate both that counsel's performance was deficient and that he was prejudiced by that performance before he can prevail on an ineffective assistance of counsel claim. Thus, petitioner must first show "that counsel's representation fell below an objective standard of reasonableness." *Strickland*, 466 U.S. at 687-88. "The objective standard of reasonableness is 'highly deferential' and includes a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *Skaggs*, 27 F.Supp.2d 952, 967 (1988) (*citing Strickland*, 466 U.S. at 688, 689). Under this standard, "[t]he assistance required of counsel is not that of the most astute counsel, but rather that of 'reasonably effective assistance.'" *Id.*

A defendant is entitled to effective assistance of counsel in his first appeal as a matter of right. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). Attorney error may constitute cause for failure to comply with a procedural rule if it constitutes ineffective assistance of counsel under *Strickland*. *See, e.g., Rust v. Zent*, 17 F.3d 155, 161 (6th Cir. 1994); *Ritchie v. Eberhart*, 11 F.3d 587, 591 (6th Cir.1993). The two-part test enunciated in *Strickland*, discussed above, is, thus, applicable to claims of ineffective assistance of appellate counsel: Esparza must show that his appellate counsel's performance was deficient, and that the deficient performance so prejudiced the defense that the appellate

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there was an abundance of other evidence to support [the] convictions." *Watson v. United States*, 168 F.3d 491 (Table), 1998 WL 791846, at *1 (6th Cir. Nov. 5, 1998).

proceedings were unfair and the result unreliable. *Strickland*, 466 U.S. at 687. In the context of an ineffective assistance of *appellate* counsel claim, a petitioner must show "that the direct appeal of [those] issue[s] [that appellate counsel did not raise] would likely have been successful." *Leggett v. United States*, 101 F.3d 702 (Table), 1996 WL 665580, at *2 (6th Cir. Nov. 14, 1996).

In determining whether this standard has been satisfied, a Court must be mindful that an appellant has no constitutional right to have every non-frivolous issue raised on appeal, *Jones v. Barnes*, 463 U.S. 745, 750-54 (1983), and tactical choices regarding issues to raise on appeal are properly left to the sound professional judgment of counsel. *United States v. Perry*, 908 F.2d 56, 59 (6th Cir.), *cert. denied*, 498 U.S. 1002 (1990). Indeed,

> [m]ost cases present only one, two, or three significant questions .... Usually, ... if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.

Jones, 463 U.S. at 752 (*quoting* R. Stern, *Appellate Practice in the United States* 266 (1981)). Moreover, an attorney is not required to present an argument on appeal for which there is no good-faith factual support, in order to avoid a charge of ineffective representation. *Krist v. Foltz*, 804 F.2d 944, 946-47 (6th Cir. 1986). With this standard in mind, the Court will consider those claims premised on Esparza's contention that his appellate counsel should have pursued different or additional arguments on appeal.

a. Esparza's Eleventh Claim for Relief

In Esparza's eleventh claim, he recites a litany of trial counsel's purported failures during voir dire and asserts that appellate counsel was deficient in failing to point these failures out to the Court of Appeals. Specifically, Esparza maintains that trial counsel failed to ask questions regarding jurors' beliefs about the death penalty, failed to "rehabilitate" any "favorable" jurors, and failed to object to numerous instances of prosecutorial misconduct.

As the Ohio Court of Appeals noted:

> Upon a thorough review of the record in this case, as well as our previous decisions and the decision of the Ohio Supreme Court affirming appellant's conviction and sentence, we conclude that appellant has failed to establish that the outcome of his trial would have been different had his trial counsel not committed the alleged errors.

State v. Esparza, No. L 84-255 (Ohio Ct. App. July 27, 1994). Upon review of the record, the Court determines that the Ohio Court of Appeals decision was not an unreasonable application of clearly established federal law. None of these alleged errors infected the voir dire process in such a way as to draw into question the fundamental fairness of either that process or the verdict of the jury selected thereby. Thus, Esparza's appellate counsel was not ineffective for failing to raise these issues and Esparza's eleventh claim for relief is not well-taken.

b. Esparza's Fourteenth and Seventeenth Claims for Relief

As the allegations in Esparza's fourteenth and seventeenth claims for relief are essentially identical, the Court will address them together. In these claims, Esparza alleges ineffective assistance of counsel based on his appellate counsel's failure to attack trial counsel's failure to conduct an adequate pre-trial investigation. Had trial counsel effectuated a proper pre-trial investigation, Esparza argues, counsel would have discovered the identity of other individuals suspected in Melanie Gerschultz's murder. This discovery allegedly would have led trial counsel to pursue a strategy other than the "burden of proof" strategy followed at trial, and raising this point on appeal allegedly would have prompted reversal.

These assertions are unpersuasive as they fail both prongs of the *Strickland* test. Trial counsel's decision regarding what defense to assert at trial is precisely the type of decision for which *Strickland* mandates deference. Further, even if counsel had presented a defense suggesting other possible suspects, there is no certainty that the outcome would have been altered:

> [T]he right to the effective assistance of counsel is recognized not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial. Absent some effect on the reliability of the trial process, the Sixth Amendment guarantee is generally not implicated.

Lockhart v. Fretwell, 506 U.S. 364, 369 (1993) (*quoting United States v. Cronic*, 466 U.S. 648, 658 (1984)).

An abundance of evidence, most particularly the testimony of Lisa Esparza and of Richardson, render the jury's findings reliable. Thus, Esparza cannot satisfactorily demonstrate how, if appellate counsel had raised this issue on appeal, the result of the appeal would have been altered. Because the Ohio Court of Appeals' determinations were not unreasonable, the Court finds Esparza's fourteenth and seventeenth claims for relief are not well-taken.

c. Esparza's Fifteenth Claim for Relief

In this claim for relief, Esparza contends that trial counsel was ineffective for failing to request an *in camera* inspection of witnesses' statements to which he is entitled pursuant to Ohio R. Crim. P. 16(B)(1)(g) and that appellate counsel should have pursued this issue. Had the trial court held such a hearing, Esparza maintains, trial counsel would have ascertained various inconsistencies in the testimony of Lisa Esparza and James Barrailloux, thus creating a possibility for impeachment.

The Court finds this argument unpersuasive under *Strickland*. While Esparza supplies elaborate detail regarding disparities between the investigative statements and the trial testimony of several eyewitnesses, Esparza again fails to persuade the Court that these inconsistencies were so material as to have altered the outcome of Esparza's appeal. The Court finds the Ohio Court of Appeals reasonably applied federal law to this claim and, thus, Esparza's fifteenth claim for relief is not well-taken.

d. Esparza's Sixteenth Claim for Relief

In his sixteenth claim for relief, Esparza asserts trial counsel's ineffectiveness because counsel called Ms. Elsie Dile to testify and appellate counsel did not attack this decision on appeal. At trial, Ms. Dile described a man who was present at her home on the night of the murder as not particularly tall, with broad shoulders, a shaven head and wearing a ski mask. She particularly noted the ski mask, claiming it was identical to one depicted on the Channel Eleven news that evening. On cross-examination, the prosecutor effectively impeached Ms. Dile's testimony with the testimony of Channel Eleven news director, Rick Gevers. Mr. Gevers stated that, on the night of the robbery, the news broadcast made no mention of the ski mask. Esparza asserts that, if trial counsel had diligently conducted a pre-trial investigation, counsel would have discovered this inconsistency and never called Ms. Dile to testify.

Once again, this claim questions trial strategy and is at loggerheads with *Strickland*. Even Esparza concedes in his Petition that one strategy of the defense in calling Ms. Dile might have been "to demonstrate that Gregory could not have been at his sister Lisa's apartment confessing to her on the night of the slaying." The fact that the potential benefits of Ms. Dile's testimony may have been undercut by her tendency to overstate the facts does not render the initial decision to call her ineffective. Because this was a tactical decision made by trial counsel, it is not unreasonable that appellate counsel failed to raise it in Esparza's direct appeal. Consequently, Esparza's sixteenth claim for relief is not well-taken.

e. Esparza's Nineteenth Claim for Relief

In Esparza's nineteenth ground for relief, he maintains trial counsel's ineffectiveness based on counsel's failure to make numerous objections to: (1) an inadequate capital specification; (2) unduly suggestive pretrial identification procedures; (3) testimony concerning the alarm system; (4) testimony of Lisa Esparza; (5) the prosecutor's closing arguments; and, (6) the court's jury instructions in the trial phase. As stated above, sub-claims two, three and four are procedurally defaulted. Furthermore, sub-claims one, three, five, and six are raised as separate substantive claims and addressed elsewhere in this Opinion. All of the substantive underlying claims, except for claim one, lack merit, and, therefore, fail the prejudice prong of *Strickland*, *i.e.*, counsel was not unreasonable to not object as it could not have produced a different outcome. Thus, these subclaims are not well-taken. The Court discusses the underlying substantive claim in claim one, that the indictment lacked all of the elements necessary for the capital specification in part VII.C.1 of this decision.

6. Esparza's Twelfth Claim for Relief

Esparza's twelfth ground for relief is that Lisa Esparza's testimony was false and unreliable, and the prosecutor's solicitation of this testimony violated Esparza's constitutional rights. This claim is based on Lisa Esparza's recent recantation of her earlier testimony. She now claims that she lied when she testified that Esparza admitted to killing Melanie Gerschultz. Because this claim is based on facts obtained during the evidentiary hearing, the Court decides the claim without the aid of state court factual findings.

The Sixth Circuit has set forth the requirements for a prosecutorial misconduct claim premised on a prosecutor's alleged use of perjured testimony:

> The knowing use of false or perjured testimony constitutes a denial of due process if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. In order to establish prosecutorial misconduct or denial of due process, the defendants must show (1) the statement was actually false; (2) the statement was material; and (3) the prosecution knew it was false. The burden is on the [petitioner] to show that the testimony was actually perjured, and mere inconsistencies in the testimony by government witnesses do not establish knowing use of false testimony.

Coe v. Bell, 161 F.3d 320, 343 (6th Cir. 1998) (*quoting United States v. Lochmondy*, 890 F.2d 817, 822 (6th Cir. 1989)).

Esparza's only evidence on this score is Lisa Esparza's own recantation. Lisa Esparza testified regarding the reasons behind her earlier testimony, asserting that she was instructed to testify as she did by her then-boyfriend, Frank Ochoa. Lisa Esparza testified that she was afraid of her boyfriend because he beat her and further claimed she was threatened by then-prosecutor Franks that, if she chose not to testify, her children would be taken away from her.

After observing Lisa Esparza's demeanor on the witness stand, her lack of a cogent, convincing explanation for her earlier testimony *and* her delay in coming forward, the

Court does not find Lisa Esparza's claim to be credible.[32] Accordingly, Esparza is unable to show that the statement was false, and, therefore, also is unable to show that the prosecution knowingly presented perjured testimony. Accordingly, this claim is without merit.

7. Esparza's Eighteenth Claim for Relief

In his eighteenth claim, Esparza alleges his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated when the trial court failed to appoint an independent pathologist or forensic expert to counter the State's expert. Specifically, Esparza notes that the State's expert found that physical evidence suggested the fatal shot was fired by someone standing directly in front of the Plexiglas, consistent with the State's theory that Gerschultz was shot when attempting to press the alarm button. Esparza claims both that counsel was ineffective for failing to request an independent expert and that the trial court erred when it did not, *sua sponte*, appoint an independent expert to counter the State's expert. The Court disagrees.[33]

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[32] On the contrary, despite fair room for impeachment of Mr. Ochoa's character, the Court found Mr. Ochoa's denials of Ms. Esparza's claims believable.

[33] The Court notes that respondent did not address this claim in the Return of Writ. While respondent did group this claim into its section addressing "Errors Associated with the Pre-Sentence Investigation and Psychological Report," that section of the brief solely addresses Esparza's claims grounded in his psychological evaluation. Because respondent neither alleges procedural default nor claims petitioner failed to address the claim in the state courts, the Court will address this claim on the merits.

If declared indigent, a criminal defendant possesses the right to obtain a competent psychiatrist if sanity at the time the crime was committed is at issue. *Ake v. Oklahoma*, 470 U.S. 68 (1985). The Supreme Court has eschewed extending this right to non-psychiatric experts. In *Caldwell v. Mississippi*, 472 U.S. 320 (1985), the Court determined that the petitioner in that case was not entitled to receive state-funded services from various experts without a prior showing that such testimony related to a significant issue at trial. The Court stated:

> [P]etitioner also requested appointment of a criminal investigator, a fingerprint expert, and a ballistics expert, and those requests were denied. The State Supreme Court affirmed the denials because the requests were accompanied by no showing as to their reasonableness. For example, the defendant's request for a ballistics expert included little more than the general statement that the requested expert would be of great necessarius witness. Given that petitioner offered little more than undeveloped assertions that the requested assistance would be beneficial, we find no deprivation of due process . . . .

Id. at 323 n.1 (citations omitted) (internal quotation marks omitted).

Similar to the *Caldwell* petitioner, Esparza provides no factual allegations to substantiate the claim that *his* independent expert would conclude differently than the State's. Without such assertions, the Court finds no constitutional infirmity in counsel's failure to request and the

trial court's failure to appoint such an expert. Accordingly, Esparza's eighteenth claim for relief is not well-taken.

8. Esparza's Twentieth Claim for Relief

Esparza's twentieth claim for relief alleges prosecutorial misconduct during voir dire and the guilt phase of the trial. During voir dire, Esparza alleges that the State bolstered the testimony of Albert Richardson, vouching for his credibility. During trial, Esparza asserts that the prosecutor characterized Alexander's testimony as "wonderful" and engaged in excessive leading of the State's witnesses on direct examination. Finally, Esparza alleges numerous instances of prosecutorial misconduct during closing arguments as the prosecutor: (1) misstated the law as to the issues of intent and foreseeability; (2) argued the relative value of giving Richardson a reduced sentence for Melanie Gerschultz's life; (3) urged the jury to overlook the lack of eyewitness identification; (4) urged the jury to find guilt to protect the State's witnesses from petitioner; and, (5) argued facts not in the evidence.

The Court finds this claim procedurally defaulted. In its brief, respondent correctly asserts that these claims were not asserted on direct appeal and, thus, may not be pursued further, either in state or federal court. In his Traverse, petitioner contends that respondent did not allege the twentieth claim for relief was procedurally defaulted. Esparza then makes reference to respondent's Return of Writ answering allegations of prosecutorial misconduct during the *mitigation* phase of the proceeding. Because Esparza does

not demonstrate cause and prejudice to excuse default, the Court concludes these claims are procedurally defaulted.[34]

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[34] To aid in appellate review, the Court finds that none of these claims are meritorious in any event.

A prosecutor's conduct does not amount to a constitutional violation unless the comment "so infected the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)(*quoting Donnely v. DeChristoforo*, 416 U.S. 637, 642 (1974)).

The prosecutor's comments must be so egregious as to render the trial fundamentally unfair. *See Byrd v. Collins*, 209 F.3d 486, 529 (6th Cir. 2000). "To constitute a denial of due process, the misconduct must be 'so pronounced and persistent that it permeates the entire atmosphere of the trial.'" *Id.* The Sixth Circuit has used a four-part test to determine whether the prosecutor's conduct is egregious. A reviewing court should determine the degree to which the remarks complained of have a tendency to mislead the jury and prejudice the accused; whether they were isolated or extensive; whether they were deliberately or accidently placed before the jury; and the strength of the competent proofs introduced to establish the guilt of the accused. *Id.* (*quoting Pritchett v. Pitcher*, 117 F.3d 959, 964 (6th Cir.) *cert. denied*, 522 U.S. 1001 (1997). Relief will not be granted unless "the prosecutor's statement likely had a bearing on the outcome of the trial in light of the strength of the competent proof of guilt." *Id.*

The Court does not find that any error arose to such a level as to render the trial fundamentally unfair. While some of the prosecutor's arguments may not have been appropriate, taken, the prosecutorial comments do not taint the entire

10. Esparza's Twenty-First Claim for Relief

In his twenty-first claim for relief, Esparza alleges his Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated because of an array of jury instructions the trial court provided during the guilt phase.[35] Esparza asserts the trial court charged the jury improperly in eight instances[36]: (1) regarding the lesser-included offense of manslaughter; (2) as to motives behind the testimony of state witnesses; (3) that a pistol was a deadly weapon; (4) in defining terms constituting elements of the offenses charged; (5) in giving cautionary instructions regarding Albert Richardson's testimony; (6) as to how the jury is to react if in equipoise regarding whether circumstantial evidence creates inferences of guilt or innocence; (7) as to placement of the burden of proof regarding specific intent to kill; and (8) on the issue of the reliability of eyewitness testimony.

An incorrect jury instruction does not warrant federal habeas corpus relief if it was merely undesirable, erroneous or even universally condemned. Instead, the instruction must violate a constitutional right. *Estelle v. McGuire*, 502 U.S. 62, 72 (1991). Upon review, a court must determine whether there is a reasonable likelihood that the jury applied the

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proceeding. Further, the Court finds resounding evidence of guilt introduced at trial. Thus, Esparza's contention of prosecutorial misconduct at voir dire and during the guilt phase of the trial does not merit habeas relief.

[35] Respondent does not allege procedural default. Therefore, the Court will address this claim on the merits.

[36] The Court has grouped together similar claims so that they may be addressed simultaneously.

instruction in a way that prevents consideration of constitutionally relevant evidence. *Boyde v. California*, 494 U.S. 370, 380 (1990). The impropriety of the instruction must be considered in the context of the instructions as a whole and the trial record. *Id.* Rarely will an erroneous jury instruction justify reversal in a criminal case when no objection was made in the trial court. *Henderson v. Kibbe*, 431 U.S. 145, 154 (1977).

When considered in the context of the entire proceeding, this claim must fail. Although the allegations in each of Esparza's sub-claims do assert federally cognizable rights, any imperfections found within each instruction do not rise to the level of a federal constitutional violation. Upon review of the record, there appear to be no constitutional infirmities. The Court will address the reasons for its conclusion as to each claim.

Esparza first takes issue with the trial court's instruction regarding the lesser-included offense of manslaughter, noting that the court charged the jury that it first must find defendant not guilty of aggravated murder before concluding he could be found guilty of involuntary manslaughter. While it is true the trial court did so charge, this charge is not constitutionally infirm. To support this sub-claim, Esparza cites to *Lee v. Taylor*, 740 F.2d 968 (6th Cir 1984). This case is inapposite to Esparza's claim. In that case, the trial court impermissibly required the defendant to prove beyond a reasonable doubt that he was under extreme emotional distress for the jury to find him guilty of the lesser-included offense of voluntary manslaughter. *See Lee v. Taylor*, 566 F. Supp. 28 (N.D. Ohio 1983). The court did not shift the burden to the defendant on any issue here and its instruction on this point, thus, did not suffer from the deficiency presented in *Lee*. Since Esparza offers nothing else to support this claim and the Court finds *Lee*

distinguishable, the Court finds no constitutional infirmity in this instruction.[37]

Esparza next claims that the he should be afforded relief because the trial court failed to disclose the monetary motives behind Lisa Esparza and Albert Richardson's testimony. To support the claim that such an instruction invokes a constitutional right, Esparza cites to *United States v. Griffin*, 382 F.2d 823 (6th Cir. 1967), in which the Sixth Circuit overturned a conviction without a cautionary instruction regarding the testimony of an informant whose testimony was largely uncorroborated. In a subsequent case, however, the Sixth Circuit explained and distinguished *Griffin*, affirming another informant-based conviction without a cautionary charge because both informants' testimonies substantially corroborated each other "as to the major aspects of the case, not just the minor points." *United States v. Curtsinger*, 9 F.3d 110 (Table), 1993 WL 424842, at *19 (6th Cir. Oct. 20, 1993), *cert. denied*, 510 U.S. 1207 (1994). Because Lisa Esparza and Albert Richardson's testimony are substantially, if not completely, corroboratory, this sub-claim is without merit.

Esparza alleges further constitutional infirmity because the trial court told the jury that a loaded pistol is a deadly weapon. Esparza claims that this instruction

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[37] Nothing in *U.S. v. Monger*, 185 F.3d 574 (6th Cir. 1999) persuades this Court otherwise. In *Monger*, the Sixth Circuit held that the defendant was entitled to an instruction on a lesser-included offense if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater, but did not state anything about the order in which the jury must ascertain guilt on the instructed offenses.

implicitly revealed to the jury that the prosecution had met its burden as to one element of the offense. When charging the jury, the trial court did tell the jury that a loaded pistol was a deadly weapon. The trial court did not, however, make the essential link to Esparza's case – that he, in fact, possessed a loaded pistol. Thus, the court did not remove an aspect of the state's burden from the jury's consideration and no constitutional right is implicated.

Esparza contends that the court did not adequately define the terms of the offenses, as was requested in his own jury instructions. In this allegation, however, Esparza neither cites specific examples of which charges were omitted nor explains why the trial court's charges were deficient. Without further explanation, the Court cannot find a constitutional violation.

Esparza next claims that the trial court twice gave a cautionary instruction to explain the purpose of introducing Richardson's prior criminal convictions. Esparza maintains that this instruction somehow served to "bolster" and accentuate Richardson's testimony. The Court finds to the contrary. Rather than enhancing Richardson's testimony, the trial court's instruction *undermined* Richardson's credibility as it permitted jurors to consider his criminal convictions when determining his believability. Thus, this sub-claim is not well-taken.

Esparza claims constitutional infirmity because the trial court failed to instruct the jury that, if the circumstantial evidence creates inferences that are equally consistent with either innocence or guilt, such inferences must be resolved in favor of the defendant's innocence. The Court finds this argument unpersuasive as Esparza can point to no law that requires such a charge. Furthermore, the Court determines that, taken as a whole, the trial court adequately apprized the

jury of the means by which it can draw inferences from circumstantial evidence and of the nature of the heavy burden of proof imposed upon the prosecution in any criminal case.

Esparza next argues that the trial court impermissibly shifted the burden of proof when instructing the jury about the intent to kill it must find to convict. The Court disagrees with this factual assessment. The trial court correctly noted that it was the state's obligation to present sufficient evidence that Esparza possessed the specific intent to kill Ms. Gerschultz. Thus, this sub-claim is without merit.

Finally, Esparza asserts constitutional infirmity because the trial court did not charge the jury about the potential concerns raised when relying on eyewitness testimony. To support this proposition, Esparza cites *United States v. Telfaire*, 469 F.2d 552 (D.C. Cir. 1972). *Telfaire*, however, does nothing to support Esparza's claim. In *Telfaire*, the D.C. Circuit *upheld* the trial court's omission of an eyewitness charge, determining that "the minds of the jury were plainly focused on the need for finding the identification of the defendant as the offender proved beyond a reasonable doubt." *Id.* at 556. Similarly, the trial court here adequately advised the jury of their obligation to identify Esparza as Melanie Gerschultz's assailant. Accordingly, this sub-claim is without merit.

As none of the above sub-claims present federal constitutional issues, Esparza's twenty-first claim for relief is not well-taken.

10. Esparza's Twenty-Second and Twenty-Third Claims for Relief

Both the twenty-second and twenty-third claims for relief allege that there was insufficient evidence to convict

Esparza of capital murder. Specifically, Esparza contends that there was insufficient evidence to: (1) identify Esparza as the assailant; (2) find that Esparza possessed the requisite specific intent to commit aggravated murder; or, (3) find by proof beyond a reasonable doubt that Esparza was guilty of the capital specification.[38]

"Sufficient evidence supports a conviction if, after viewing the evidence (and the inferences to be drawn therefrom) in the light most favorable to the prosecution, the court can conclude that any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Fisher v. Burke*, 113 F.3d 1234 (Table), 1997 WL 225507, at *2 (6th Cir. May 1, 1997) (*citing Jackson v. Virginia*, 443 U.S. 307, 324 (1979)). *See also Scott v. Mitchell*, 209 F.3d 854, 885 (6th Cir. 2000); *Walker v. Russell*, 57 F.3d 472, 475 (6th Cir. 1995), *cert. denied*, 516 U.S. 975 (1995). The Fourteenth Amendment does not "requir[e] that all other interpretations of the evidence except guilt of the defendant be ruled out." *Delk v. Atkinson*, 665 F.2d 90, 100 (6th Cir. 1981). A conviction may be supported entirely by circumstantial evidence, *Tilley v. McMackin*, 989 F.2d 222, 225 (6th Cir. 1993),[39] and such evidence need not

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[38] Because respondent does not allege that any of these claims have been procedurally defaulted, the Court will address these claims on the merits.

[39] Indeed, "[c]ircumstantial evidence . . .may . . .be more certain, satisfying and persuasive than direct evidence." *Michalic v. Cleveland Tankers, Inc.*, 364 U.S. 325, 330 (1960).

remove every reasonable hypothesis except that of guilt. *Neal v. Morris*, 972 F.2d 675, 678 (6th Cir.1992).[40]

Esparza points to inconsistencies in the statements of identifying witnesses James Barrailloux, Lisa Esparza, and Albert Richardson to buttress his claim that there was insufficient evidence to identify him as the murderer. Additionally, Esparza maintains that Barrailloux could not specifically identify him as the assailant and that both Lisa Esparza and Albert Richardson stood to gain pecuniarily for their testimony.

Although inconsistencies no doubt exist, they are not so egregious as to warrant relief based on insufficient evidence. As stated above, Esparza is not entitled to a favorable jury factual finding merely because the jury *could have* adopted other plausible factual scenarios. The Court concludes that a factfinder could reasonably infer that the inconsistencies between Barrailloux's testimony and Esparza's actual appearance are insignificant. Furthermore, a rational factfinder could conclude that the testimony of Lisa Esparza and Richardson was truthful, despite possible ulterior motives for taking the stand.

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[40] Under current Ohio law, murder convictions can rest solely upon circumstantial evidence. *See State v. Grant*, 620 N.E.2d 50, 65 (Ohio 1993), *cert. denied*, 513 U.S. 836 (1994)(*citing State v. Nicely*, 529 N.E.2d 1236, 1239 (Ohio 1988)). Ohio law formerly required that, where "[c]ircumstantial evidence [is] relied upon to prove an essential element of a crime[,] [it] must be irreconcilable with any reasonable theory of an accused's innocence in order to support a finding of guilt." *State v. Kulig*, 309 N.E.2d 897, syllabus (Ohio 1974). This is no longer the law in Ohio. *State v. Jenks*, 574 N.E.2d 492 (Ohio 1991).

The Ohio Supreme Court concluded there was ample circumstantial evidence to support the jury's finding that Esparza possessed the specific intent to kill:

> The record shows appellant entered the carryout for the express purpose of committing a robbery. He carried a loaded semi-automatic handgun which requires cocking before the first bullet from the magazine enters the firing chamber, making it able to fire. He ordered Gerschultz to the cash register, obtained the money, and while standing near or exiting through the entrance, he fired a shot which passed through the Plexiglas, striking Gerschultz in the neck. The fact that the hole in the Plexiglas was four feet, seven and one-half inches from the floor and that Gerschultz was five feet, five inches tall indicates that he fired the shot directly at her, and considerably weakens [Esparza's] argument that he meant to fire only a warning shot in her direction. It is well established that where an inherently dangerous instrumentality was employed, a homicide occurring during the commission of a felony is a natural and probable consequence presumed to have been intended. Such evidence is sufficient to allow a jury to find a purposeful intent to kill.

State v. Esparza, 529 N.E.2d 192, 198-99 (Ohio 1988). The Court does not find this conclusion unreasonable.

Esparza also states that the jury could not have found beyond a reasonable doubt that he was guilty of the capital specification, because they were not charged with the capital

specification. Although the Court finds that it was constitutional error not to charge the jury with all of the elements in the capital specification, and the Court, as explained below, grants partial habeas relief on that ground, the Court's analysis of that claim for relief is not based on the sufficiency of the evidence against Esparza. Indeed, as discussed below, had Esparza been properly indicted, and the jury, in turn, properly charged, the evidence clearly could have supported the conclusion that Esparza was the principal perpetrator of this offense. The Court, therefore, does not find this claim for relief, as presented here, well-taken.

11. Esparza's Fifty-First Claim for Relief

In his fifty-first ground for relief, Esparza alleges that his death sentence is unconstitutional because residual doubt exists as to his conviction.[41] Esparza then reviews inconsistencies in the testimony of the governmental eyewitnesses regarding the identification of the Island Carryout robber. The Court is unaware of any constitutional right regarding residual doubt. If petitioner is arguing that the inconsistent testimony is inconclusive beyond a *reasonable* doubt, essentially an insufficient evidence assertion, the Court addressed that claim in Esparza's twenty-second and twenty-third grounds for relief.

In its Return of Writ, respondent addresses this issue as though petitioner were asserting the trial court should have instructed the jury that residual doubt may constitute a separate mitigating factor. This response appears inapplicable to petitioner's original claim and Esparza does not address this claim in his Traverse. If this is, indeed,

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[41] Respondent does not allege this claim is procedurally defaulted. The Court will address this claim on its merits.

petitioner's allegation, then respondent correctly asserted in its Return of Writ that "the Supreme Court rejected the contention that a defendant convicted of a capital crime has a constitutional right to a jury instruction concerning residual doubts over a defendant's guilt at the sentencing phase of the trial." Resp. Return of Writ at 163 (*citing Franklin v. Lynaugh*, 487 U.S. 164 (1988)). Because petitioner alleges no cognizable constitutional claim, his fifty-first ground for relief is not well-taken.

C. Constitutional Violations Relating to the Mitigation Phase and Sentencing

1. First Claim for Relief

Esparza's first ground for relief is based on the fact that the indictment did not contain all of the elements necessary to charge him with capital murder. For this reason, Esparza asserts it was error for the judge to impose a sentence of death.[42] Specifically, Esparza alleges that the

[42] Respondent does not allege that this claim is procedurally defaulted, nor could he in light of the record below. Although Esparza did not raise this issue until his first post-conviction appeal, the appellate court found that the issue was not barred by the doctrine of res judicata because "[i]t is well-established that a court has no power to substitute a different sentence for that provided for by statute," and when a court does impose a sentence not provided for by law, such sentence is void. Moreover, an attack on a void judgment is always proper and may be raised at any point during a case's proceedings." *See State v. Esparza*, 1992 WL 113827, at *6 (Ohio App. May 29, 1992) (citations omitted). The appellate court then proceeded to address the claim on its merits. The Court, therefore, finds that the claim is not procedurally defaulted and will, thus, address it on its merits.

death penalty specification in Count One (1) failed to allege that Esparza either (a) was the principal offender, or (b) had committed the aggravated murder with prior calculation and design. Because these elements were absent from the indictment, the jury instructions, which mirrored the language of the indictment, did not require the jury to find the existence of one or both of these facts as a prerequisite to a guilty verdict. Thus, Esparza challenges the failure of the indictment to actually charge him with capital murder and the failure of the trial court to instruct the jury that they must find one of these specifications in order to convict him of capital murder.

Under Ohio law, an indictment must charge, and a jury must find, that the defendant either was the principal offender or acted with prior calculation and design in the commission of an aggravated murder before a defendant can be death-penalty eligible. Specifically, Ohio Rev. Code § 2929.03(A) provides:

> (A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender.

Ohio Rev. Code § 2929.04 states in relevant part:

> (A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the

> indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:
>
> * * *
>
> (7) The offense was committed while the offender was committing, attempting to commit ... aggravated robbery, ... and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design.

Ohio Criminal Rule 7(B) also requires an indictment to include "words sufficient to give the defendant notice of all elements of the offense with which he is charged." Ohio R. Crim. P. 7(B).

As stated previously, the first count of the indictment charging Esparza with aggravated murder reads:

> "THE JURORS OF THE GRAND JURY *of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that* GREGORY ESPARZA, on or about the 12th day of February, 1983, in Lucas County, Ohio, did purposefully cause the death of Melanie Gerschultz, while committing aggravated robbery, in violation of § 2903.01(B) of the Ohio Revised Code, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

> SPECIFICATION OF FIRST COUNT:
>
> THE GRAND JURORS FURTHER FIND AND SPECIFY that the defendant had a firearm on or about his person or under his control while committing the offense pursuant to §2929.71, Ohio Revised Code.
>
> * * *
>
> ADDITIONAL SPECIFICATION TO THE FIRST COUNT: THE GRAND JURORS further find and specify that the said offense was committed while GREGORY ESPARZA, the accused herein, was committing aggravated robbery.

State v. Esparza, No. L-84-2257, 1992 WL 113827, at * 3 (Ohio Ct. App. May 29, 1992).

Upon review of the face of the indictment, it is apparent that the indictment, indeed, failed to contain an appropriate capital specification because it did not charge Esparza with being the principal offender or with having committed the murder with prior calculation and design. It is also obvious from the face of the record that the trial court failed to instruct the jury that, in order to convict Esparza of *capital* murder, as distinct from mere *aggravated* murder, it must find that he either was the principal offender or that he committed the murder with prior calculation and design.

The state court conceded that there was no capital specification obvious on the face of the indictment, but concluded that this fact did not prohibit Esparza's conviction for capital murder. This is so, the state court reasoned,

because it found that the indictment was sufficient, despite the absence of certain precise language, to put Esparza on notice of all of the elements of the offense with which he was charged. Thus, the state court found that the "principal offender" specification was implicit in the indictment because no one other than Esparza was charged with participating in the events described. The court stated:

> We conclude that where only one defendant is named in an indictment alleging felony murder, it would be redundant to state that the defendant is being charged as the principal offender. Only where more than one defendant is named need the indictment specify the allegation 'principal offender.'

State v. Esparza, 1992 WL 113827, *8 (Ohio App. May 29, 1992).[43]

It appears, accordingly, that without saying so expressly, the state court engaged in a harmless error analysis, finding that the absence of the words "principal

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[43] The state court judges to consider the issue were not unanimous on this point. When the matter was considered by the state court of appeals, Judge Sherck dissented, finding the indictment invalid because it lacked a required specification and concluding that the trial court, therefore, lacked jurisdiction to impose a sentence of death. *See Esparza*, 1992 WL 113827 at *9. More specifically, Judge Scherk found that it was error to sentence Esparza to death because his indictment failed to mention an accomplice and failed "to charge the accused with being the principal offender, or committing the aggravated murder with prior calculation and design." *Id.* at *10.

offender" in the indictment was not meaningful where, as here, there was only one offender charged in that indictment.[44] While there is a certain appeal to the state court's logic,[45] the Court is compelled to conclude that it is inconsistent with, and, indeed, is an unreasonable application of federal law.

To be on firm constitutional footing, an indictment must pass a two-pronged test:

> [F]irst, the indictment must set out all of the elements of the charged offense and must give notice to the defendant of the charges he faces; second, the indictment must be sufficiently specific to enable the defendant to plead double jeopardy in a subsequent proceeding, if charged with the same crime based on the same facts.

United States v. Martinez, 981 F.2d 867, 872 (6th Cir. 1992), *cert. denied*, 507 U.S. 1041 (1993)(*citing Russell v. United States*, 369 U.S. 749, 763-64 (1962)). Mindful that "the state legislature's definition of the elements of the offense is usually dispositive," *Hoover v. Garfield Heights Mun.*

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[44] Under Ohio law, "principal offender" simply means "actual killer." *See State v. Chinn*, 709 N.E.2d 1166, 1177 (Ohio 1999) (*citing State v. Penix*, 513 N.E.2d 744, 746 (1987)).

[45] While the state court did not say so, it presumably extended this logic to the absence of a charge to the jury on this issue; where the evidence only references one offender, a jury finding that Esparza was *an* offender implies the finding that he was also *the principal* offender.

Court, 802 F.2d 168, 173 (6th Cir. 1986), *cert. denied*, 480 U.S. 949 (1987), it is clear that Esparza's indictment did not pass the first prong of the *Martinez* test as it did not specify the elements required to charge Esparza with capital murder as defined by Ohio Rev. Code §2929.04(A)(7), though it may have, as the Ohio courts concluded, given Esparza sufficient notice of the charge he faced.

In *In re Winship*, 397 U.S. 358, 364 (1970), the United States' Supreme Court held that "the Due Process Clause protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged. Similarly, in *United States v. Gaudin*, 515 U.S. 506, 510 (1995), the Supreme Court unanimously found that the right to due process of law and to a trial by jury, taken together, entitle a criminal defendant to "a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt." And, the Supreme Court re-emphasized these principles in 1999 when, in *Jones v. United States*, 526 U.S. 227, 243, n.6 (1999), it noted that "under the Due Process Clause of the Fifth Amendment and the notice and jury guarantees of the Sixth Amendment, any fact, (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt."

Most recently, and most pointedly for purposes of this case, the Supreme Court relied on this line of authority to reverse imposition of a sentence because that sentence was premised on a finding by a trial judge that the crime of which the defendant had been convicted was prompted by racial bias. *Apprendi v. New Jersey*, – U.S. – , 120 S.Ct. 2348 (2000). The *Apprendi* Court concluded that, because the finding of racial bias increased the penalty to which the defendant was exposed beyond the statutory maximum for

the original offense of conviction,[46] it actually subjected the defendant to punishment for a *different* crime, with *different, additional* elements. The Supreme Court concluded that it was unconstitutional to sentence Apprendi for a crime where an element of that crime had neither been set forth in the indictment, nor submitted to a jury for determination by proof beyond a reasonable doubt. The *Apprendi* Court held that "[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt." 120 S.Ct. at 2362.[47]

Apprendi's application to the circumstances presented in this case is obvious. Esparza, as noted previously, was charged in the indictment with aggravated murder under Ohio Rev. Code § 2903.01(B). More specifically, Esparza was charged with purposefully causing the death of another while committing or attempting to commit aggravated robbery. That crime is punishable by a sentence of life imprisonment, with parole eligibility after twenty (20) years. Ohio Rev. Code § 2929.04(A)(7) operates to increase or enhance the

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[46] The defendant pled guilty to two counts of possession of a firearm for an unlawful purpose and one count of unlawful possession of an anti-personnel bomb -which together exposed him to a maximum 20 year sentence. With the racial bias enhancement, the defendant faced a potential 30 year sentence.

[47] As explained in the concurring opinion by Justice Thomas, joined by Justice Scalia, "[w]hat matters is the way by which a fact enters into a sentence. If a fact is by law the basis for imposing or increasing punishment – for establishing or increasing the prosecution's entitlement – it is an element" which, in turn, must be decided by a jury. 120 S.Ct. At 2378.

sentence for the crime of aggravated murder beyond the statutory maximum otherwise set for that crime. Indeed, § 2929.04(A)(7) contains the ultimate sentencing enhancement – increasing the potential sentence from life imprisonment to death. Before the penalty enhancement under Ohio Rev. Code § 2929.04(A)(7) may apply, however, it must be established either that the defendant was the principal offender or that he committed the murder with prior calculation and design. Under *Apprendi*, these facts are elements of the crime of capital murder, which is differentiated from the crime of aggravated murder both by the existence of these differentiating facts and by the nature of the punishment which can be imposed. Thus, under *Apprendi* and *Jones*, it would be unconstitutional to convict a defendant of capital murder unless one or both of the enhancing facts under § 2929.04(A)(7) are charged in the indictment, submitted to the jury and found to exist by proof beyond a reasonable doubt.

There is no reference in the indictment in this case to Ohio Rev. Code § 2929.04(A)(7); the only statutory section mentioned in reference to Count 1 is Ohio Rev. Code § 2903.01(B). There is also no reference in the indictment to either of the sentencing-enhancing elements or facts required by § 2929.04(A)(7). Thus, while the indictment refers in two separate places to the fact that Esparza is alleged to have committed a murder in the course of an aggravated robbery, there is nothing in the indictment which refers to *any* fact or element which differentiates the charges against Esparza from the charge of aggravated murder; there is, accordingly, nothing in the indictment which indicates that the enhanced penalty authorized by Ohio Rev. Code § 2929.04(A)(7) might be applicable. There is, moreover, nothing in the record which indicates that the jury was ever referred to Ohio Rev. Code § 2929.04(A)(7), or asked to make any finding as to the specifications thereunder.

For all of these reasons, it is clear that, while Esparza was indicted for, and found guilty of, aggravated murder, the same cannot be said with respect to the crime of capital murder. It is clear, moreover, that application of the death penalty in such circumstances runs afoul of the Supreme Court's ruling in *Apprendi*, and of Esparza's right to due process and right to a trial by jury.

The next question the Court must answer is whether this error is, as the state courts appeared to believe, a harmless one in the context of this case. There are two prongs to this inquiry: (1) whether the error is susceptible to a harmless error analysis, and (2) if so, whether it is clear beyond a reasonable doubt that the error had no injurious or substantial effect on the jury's verdict.[48] In this case, the answer to prong one is particularly meaningful because, as the state court concluded, a strong inference can be drawn that the "*Apprendi* error" described above was, in the context of this case, inconsequential to the jury's verdict.[49]

The Court may only subject an error to a harmless error review where the Court concludes that the error is not "structural." *See Neder v. United States*, 527 U.S. 1, 7 (1999). A structural error is a "defect affecting the

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[48] When a reviewing court is in "grave doubt" or equipoise about whether or not the error is harmless, the Court must conclude that the error affected the jury's verdict. *See O'Neal v. McAninch*, 513 U.S. 432, 435 (1995).

[49] It is clear from the record that no one other than Esparza was indicted or tried for this murder. It appears, accordingly, that the state prosecuted Esparza as the *sole* offender involved in this robbery and murder.

framework within which the trial proceeds, rather than simply an error in the trial process itself," *Arizona v. Fulminante*, 499 U.S. 279, 310 (1991). While most constitutional errors are non-structural, and, thus, subject to harmless error review, *see Neder* at 7, there is a class of "structural" errors which are deemed so offensive to the trial process that they can never be considered harmless, no matter what the evidence establishes with respect to the defendant's guilt. *See, e.g., Johnson v. United States*, 520 U.S. 461, 468 (1997) (*citing Gideon v. Wainwright*, 372 U.S. 335 (1963) (complete denial of counsel is structural error); *Vasquez v. Hillary*, 474 U.S. 254 (1984) (racial discrimination in selection of a grand jury is a structural defect); *McKaskle v. Wiggins*, 465 U.S. 168 (1984) (denial of self-representation at trial is a structural defect); *Waller v. Georgia*, 467 U.S. 39 (1983) (defective reasonable doubt instruction not subject to harmless error assessment); *Tumey v. Ohio*, 273 U.S. 510 (1927) (biased trial judge not subject to harmless error review "no matter what the evidence was against [the defendant]").

As the Supreme Court has recently explained, this structural versus non-structural dichotomy is an absolute one – one which is not altered by the practical realities of the case at hand:

> Under our cases, a constitutional error is either structural or it is not. Thus, even if we were inclined to follow a broader "functional equivalence" test (e.g., where other facts found by the jury are "so closely related" to the omitted element "that no rational jury could find those facts without also finding" the omitted element, Sullivan, 508 U.S. at 281) (internal quotation marks omitted), such a test would be inconsistent with our traditional categorical approach to structural errors.

Neder, 527 U.S. at 14. Thus, the question of whether an error is structural must be decided without reference to the evidence admitted at trial; an assessment of the character of the defect simply does not turn on its actual effect in the particular case at bar. While this absolute has been stated clearly, it is less clear which errors fall on the respective sides of it. And, it is particularly difficult to discern whether, or to what extent, the type of error defined in *Apprendi* should be deemed structural for purposes of a harmless error analysis.

The Supreme Court has held that the failure to charge a jury as to an element of an offense can constitute harmless error. *Neder*, 527 U.S. at 15. In *Neder*, the defendant was convicted of tax fraud, which is essentially the act of knowingly making materially false statements in connection with the filing of a tax document. Although the trial court failed to instruct the jury that it needed to determine whether any false statements to the taxing authorities were material, the Supreme Court allowed the conviction to stand, finding the error was harmless. *Id.* While the holding in *Neder* is arguably inconsistent with the *Apprendi* Court's later conclusion that the right to have every element of an offense decided by the jury is a constitutional right "of surpassing importance," *Apprendi*, 120 S.Ct. at 2535, *Apprendi* did not overrule *Neder*; indeed, the *Apprendi* majority did not even mention *Neder*.[50] This Court, accordingly, must attempt, to the extent possible, to reconcile the two Supreme Court decisions. Upon doing so, the Court concludes that the error

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[50] It is notable, however, that several of the Justices who helped comprise the majority in *Apprendi* dissented from the majority holding in *Neder*.

which infected Esparza's trial by virtue of the defective indictment was a structural one which is not subject to review for harmless error.

In *United States v. Monger*, 185 F.3d 574, 577 (6th Cir. 1999), the Sixth Circuit drew a distinction between the failure to charge on a single element of an offense of conviction (as in *Neder*) and the failure to submit an entirely separate crime to the jury for consideration. Thus, in *Monger*, the Sixth Circuit held that the failure to charge the jury on a lesser included offense was structural error which could never be harmless, whatever the strength of the evidence on the actual offense of conviction. The Sixth Circuit said that the failure to instruct on the entire offense of simple possession infected the trial process and, thus, invalidated the defendant's conviction for possession with intent to distribute, regardless of the overwhelming evidence on the issue of intent. A similar distinction can be drawn in this case.

In Esparza's case, the trial court did not simply fail to charge the jury on one element of the offense of conviction. Here, the trial judge, led down this path by the defective indictment, charged the jury as to one offense – aggravated murder – but sentenced Esparza as if he had been convicted of an entirely separate offense – capital murder. As the *Apprendi* Court pointed out, the threshold inquiry must be "the seemingly simple question of what constitutes a 'crime'." 120 S.Ct. at 2367 (Thomas, J., concurring). This is so because "[t]he judge's role in sentencing is constrained at the outer limits by the facts alleged in the indictment and found by the jury. Put simply, facts that expose a defendant to a punishment greater than that otherwise legally prescribed [are] by definition "elements" of a *separate* legal offense." Id. at 2358, n.10 (emphasis added). In *Apprendi*, the Court

was concerned with a judge, rather than a jury, finding an element of a crime that changes the actual offense charged:

> Indeed, the effect of New Jersey's sentencing "enhancement" here is unquestionably to turn a second-degree offense into a first degree offense, under the State's own criminal code. The law thus runs directly into our warning in *Mullaney* that *Winship* is concerned as much with the category of substantive offense as "with the degree of criminal culpability" assessed. This concern flows not only from the historical pedigree of the jury and burden rights, but also from the powerful interests those rights serve. The degree of criminal culpability the legislature chooses to associate with particular, factually distinct conduct has significant implications both for a defendant's very liberty, and for the heightened stigma associated with an offense the legislature has selected as worthy of greater punishment.

See id. at 2365 (citations omitted).[51] If this Court were to apply a harmless error review to the defect at issue in this

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[51] In *Mullaney v. Wilbur*, 421 U.S. 684, 698 (1975), the Supreme Court found that Maine's law requiring a defendant to establish by a preponderance of the evidence that he acted in the heat of passion in order to reduce his charge from murder to manslaughter, violated due process. The Court concluded that it is the prosecution which must prove beyond a reasonable doubt the *absence* of heat of passion in order to convict a defendant of murder. In *In Re Winship*, 397 U.S. 358 (1970), the Supreme Court found that juvenile criminal defendants, as well as adult criminal defendants, have a

case, or to find it acceptable for the state court to do so, the Court would be engaging in the very conduct which *Apprendi* deemed constitutionally offensive – it would be using its judgment to convert Esparza's conviction from one for aggravated murder to one for capital murder. As the Supreme Court said in *Sullivan v. Louisiana*, 508 U.S. 275, 280 (1983), "to hypothesize a guilty verdict that was never in fact rendered – no matter how inescapable the finding to support that verdict might be – would violate the jury trial guarantee."[52]

This post-hoc determination by an appellate court of what the jury would have done *if* the capital specification question had been presented to it is particularly troubling in light of the capital scheme at issue here. As discussed later in this opinion, the Ohio Supreme Court, this Court, and the Sixth Circuit have all relied upon the existence of the capital specifications set forth in Ohio Rev. Code § 2929.04(A)(7) to conclude that the Ohio capital scheme has sufficiently narrowed the class of persons subject to the death penalty to render that scheme constitutional under *Zant v. Stephens*, 462 U.S. 862 (1983).[53]

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constitutional right to have every element of the crime proved beyond a reasonable doubt.

[52] This same concern prompted the Supreme Court's conclusion in *Rose v. Clark*, 478 U.S. 570, 578, (1986), that a Court may not direct a verdict against a criminal defendant, no matter how overwhelming the evidence of guilt.

[53] "[A]n aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. at 877.

Thus, the Ohio Supreme Court has emphasized that a defendant may not be subject to the death penalty for a mere violation of Ohio Rev. Code § 2903.01(B); before the death penalty can be imposed, the state "must *additionally* prove that the offender was the principal offender in the commission of the aggravated murder or, if the offender was not the principal offender, that the aggravated murder was committed with prior calculation and design." *State v. Jenkins*, 473 N.E.2d 264 (Ohio 1984), *cert denied*, 472 U.S. 1032 (1985)(emphasis added). *See also State v. Barnes*, 495 N.E.2d 922, 925 (Ohio 1986), *cert. denied*, 480 U.S. 926 (1987) ("the trial court had to find that [the defendant] committed murder while committing or attempting to commit a specified felony *and further* that the defendant was the principal offender or the murder was premeditated."). And, federal courts, as this one does here, have relied upon this interpretation of Ohio's capital scheme, by the highest court in the state, as support for the conclusion that Ohio's capital scheme does narrow the class of persons to whom the death penalty can be applied, and does not use the precise same factors both to convict for aggravated murder and to subject one so convicted to the death penalty. *See, e.g., Scott v. Mitchell*, 209 F.3d 854, 885 (6th Cir. 1999).

Where the existence of the specifications under Ohio Rev. Code § 2929.04(A)(7) and of the state's obligation to prove those specifications as additional factors, are critical to the constitutionality of the capital scheme, a failure to charge those factors or submit them to the jury surely must be structural. Because the state failed to indict Esparza for the offense of capital murder, and failed to instruct the jury to find all elements of the offense of capital murder, and because that error is not susceptible to a review for harmless

error, Esparza is correct that imposition of the death penalty upon him would be unconstitutional.[54]

The conclusion that an *Apprendi*-type error renders imposition of the death penalty unconstitutional in the circumstances of this case still would not entitle Esparza to relief if that conclusion were premised on an entirely new rule of constitutional law. This is true for two reasons: under *Teague v. Lane*, 489 U.S. 288, 310 (1989), a defendant generally may not rely upon new constitutional rules of criminal procedure on habeas review when the case has become final before the new rules were announced, and (2) under the AEDPA, this Court may not reject a state court ruling as unreasonable unless it finds it was unreasonable under "clearly established federal law at the time the case was decided." While it is true that *Apprendi* has surprised many lower courts and commentators, and may change the post-1990 landscape with respect to how the Federal Sentencing Guidelines are applied, the *Apprendi* majority makes it quite clear that *it* does not believe it is espousing a new rule of law.[55] Indeed, the *Apprendi* majority takes great

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[54] The Court need not and does not decide whether all *Apprendi*-type errors should be considered structural. It only concludes that, given the unique statutory structure at issue in this case and the circumstances presented here, the failure to submit any capital specification to the jury was structural. *Cf. United States v. Nordby*, -- F.3d --, 2000 WL 1277211 (9th Cir. Sept. 11, 2000); *United States v. Mojica Baez*, -- F.3d --, 2000 WL 1211013 (1st Cir. Aug. 30, 1999).

[55] The Supreme Court, indeed, traces this rule to English common law, and takes pains to show that the rule persisted, without any question to its endurance, until very recently. *See Apprendi*, 120 S.Ct. 2348, 2356 (2000) ("As a general rule, criminal proceedings were submitted to a jury after

pains to trace the history of its holding to the constitution itself and to the Supreme Court's fairly unequivocal statements in *In Re Winship*, decided well before Esparza's trial. *Apprendi*, 120 S.Ct. at 2359. The *Apprendi* majority emphasizes that, to the extent a different rule seemed to prevail after *McMillan v. Pennsylvania*, 477 U.S. 79 (1986), it was that decision, and those lower court decisions which interpreted it broadly, which were out of step with clearly established federal law. *Apprendi*, 120 S.Ct. at 2360-61.

This Court must examine the question of what constitutes a new rule of law under *Teague*, or what constitutes clearly established federal law under the AEDPA, as if looking at that question in 1983 and shortly thereafter, when Esparza was indicted, convicted and sentenced, and his appeals were considered. Examined in that light, it is clear that the *Apprendi* majority itself would say that the rule of law it espouses *was* firmly established well before that point in time. The fact that subsequent case law may have raised doubts about the continued vitality of that rule does not render the Supreme Court's reaffirmation of the principles in

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being initiated by an indictment containing 'all the facts and circumstances which constitute the offence, . . .stated with such certainty and precision, that the defendant may be enabled to determine the species of offence they constitute, in order that he may prepare his defense accordingly . . . *and that there may be no doubt as to the judgement which should be given*, if the defendant be convicted.' J.Archbold, Pleading and Evidence in Criminal Cases 44 (15th ed. 1862) (emphasis added) .... This practice at common law held true when indictments were issued pursuant to statute.")

In Re Winship a new rule of law, either for purposes of *Teague*, or of the AEDPA.[56]

Accordingly, because the state courts' endorsement of the death penalty where, as here, no capital specification was included in the indictment and none was found by the jury, is an unreasonable application of clearly established federal law, Esparza's first claim for relief is well-taken in part. The sentence of death imposed upon Esparza must be set aside; Esparza shall be re-sentenced according to the statutory guidelines for aggravated murder in the absence of a capital specification, as set forth in Ohio Rev. Code § 2929.03(A), which mandates a sentence of life imprisonment for that crime.[57]

Understanding that the entire mitigation phase of the trial was unnecessary because Esparza was never properly charged with a capital crime, the Court proceeds to examine

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[56] The Court recognizes that this conclusion could have the effect of barring resort to *Apprendi* by petitioners who seek to file a second or successive petition under the AEDPA. The Court does not, however, finally decide that issue because it is not squarely before it.

[57] The indictment properly charged Esparza with aggravated murder under Ohio Rev. Code § 2903.01(B), the judge properly charged the jury with the elements of aggravated murder, and the jury properly found Esparza guilty of aggravated murder. Thus, the Court's acceptance of this claim for relief does not vitiate the fact that Esparza was found guilty of this offense. The Court only sets aside Esparza's sentence of death under this claim for relief, because Esparza was never charged with or convicted of a capital crime.

Esparza's claims for relief based on alleged errors in that stage of the proceedings.

2. Esparza's Twenty-Fourth Claim for Relief.

In his twenty-fourth ground for relief, Esparza asserts that the trial court unconstitutionally failed to provide him with an independent, competent psychologist to present mitigating evidence. Esparza alleges that expert assistance was necessary to help prove that he had a mental disease or defect – a statutory mitigating factor in the sentencing phase. The respondent did not assert that this claim was procedurally defaulted. The court will, therefore, analyze this claim on its merits.

Esparza relies on *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985), for the proposition that he is constitutionally entitled to a psychologist to help him establish mitigating factors in a sentencing hearing. Esparza's reliance is misplaced. In *Ake*, the Court held that a defendant is entitled to a competent psychiatrist to aid with his defense in two circumstances. First, a request for psychiatric assistance must be granted during the guilt phase of the trial "when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial." *Id.* at 83. Second, the request must be granted during the mitigation phase of the trial when "the State presents psychiatric evidence of the defendant's future dangerousness" so that the defendant may rebut those claims. *Id.* A defendant is entitled to a psychiatrist to rebut the government's expert because "[w]ithout a psychiatrist's assistance, the defendant cannot offer a well-informed expert's opposing view, and thereby loses a significant opportunity to raise in the jurors' minds questions about the State's proof of an aggravating factor." *Id.* at 83. Even though a defendant is entitled to a psychiatrist under these circumstances, the defendant is not

entitled to any psychiatrist he desires or to a helpful psychiatric opinion. *See id.* ("This is not to say, of course, that the indigent defendant has a constitutional right to choose a psychiatrist of his own personal liking or to receive funds to hire his own.")

Esparza's claim falls outside the constitutional guarantee of psychiatric aid outlined in *Ake*. Esparza is not arguing that the prosecution offered psychiatric evidence of Esparza's future dangerousness and that he needed a psychologist to counter this inequity. Esparza is simply claiming that a psychologist was necessary to help prove a statutory mitigating factor. The Constitution does not guarantee a psychologist in this situation.

Esparza's claim is similar to the claim made in *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1989). In *Kordenbrock*, the defendant argued that he was entitled to a psychiatrist to help prove that his use of drugs and alcohol diminished his responsibility for the crime. The defendant wished to use a psychiatrist to prove his drug use both in the guilt and sentencing phases. Six judges on a thirteen judge panel held that *Ake* guaranteed access to psychiatric assistance in only "two situations - when the defendant's sanity is a significant factor at trial and in the context of a capital sentencing proceeding when the State presents psychiatric evidence of the defendant's future dangerousness." *Id.* at 1120 (citations omitted). This panel of judges held that the defendant was not entitled to psychiatric help at trial because he never "attempted to raise insanity as a defense." *Id.* at 1119. The defendant was also not entitled to psychiatric help to prove mitigating factors because "the state presented no psychiatric evidence at the sentencing phase." *Id.* at 1120. Another judge held that a defendant was only entitled to psychiatric assistance under

Ake when he "specifically pleads insanity or its equivalent." *Id.* at 1131 (Wellford, J., dissenting).

The prosecutor presented no psychiatric evidence during the sentencing phase, thus Esparza did not require psychiatric testimony for rebuttal purposes. The only psychiatric evidence proffered was from the pre-sentence investigation and psychological report, which Esparza requested and therefore submitted to evidence himself.[58] Although that testimony was hardly favorable to Esparza, as discussed later in the opinion, Esparza was not entitled to a favorable opinion. Accordingly, Esparza's twenty-fourth claim for relief is not well-taken.

3. Constitutional Violations Associated with the Admission of the Pre-Sentence Investigation and a Psychological Report because it Contained Allegedly Inadmissible and Prejudicial Information: Esparza's Twenty-Fifth, Twenty-Sixth, Twenty-Seventh, Twenty-Eighth, Twenty-Ninth, Thirtieth, Thirty-First, Thirty-Second, Thirty-Third, Thirty-Fourth, Thirty-Fifth, Thirty-Sixth, Thirty-Seventh, Thirty-Eighth, Forty-First and Forty-Second Claims for Relief.

Esparza's twenty-fifth through thirty-eighth, forty-first and forty-second claims for relief make a variety of

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[58] Although the Court believes it is better practice to authorize appointment of a psychiatrist for a capital defendant whenever the jury is exposed to a state *or* court-sponsored psychological assessment, the practice does not appear to be constitutionally mandated.

allegations about the pre-sentence investigation and psychological report. Many of these claims are similar or linked together so that, if the pre-sentence investigation procedure is constitutional, all of the claims will fail together. But, if the pre-sentence investigation procedure is unconstitutional, many of the claims would succeed together. Each claim will be briefly stated.

Esparza's twenty-fifth claim is that the trial court impermissibly refused to allow him to withdraw his request for the pre-sentence investigation and psychological report.

Esparza's twenty-sixth claim is that the trial court impermissibly admitted the pre-sentence investigation report because it had been prepared without reference to the appropriate guidelines. Esparza claims that the report did not contain complete information on Esparza's social, medical or mental health history or a complete and accurate discussion of his prior commitments to state institutions. He also claims that the report exceeded the guidelines by containing an item-by-item discussion of each of the mitigating factors and details from probation reports from unrelated cases.

Esparza's twenty-seventh claim is that inaccurate information contained in the report violated his constitutional rights. Esparza claims that the information regarding his history of substance abuse and his intelligence was inaccurate.

Esparza's twenty-eighth claim is that the admission of the pre-sentence investigation report, containing probation reports about totally unrelated offenses, violated his constitutional rights. Esparza alleges that these reports were unduly prejudicial because they constituted evidence of inadmissible prior bad acts through hearsay testimony.

Esparza asserts that these bad acts were considered by the jury as non-statutory aggravating factors.

Esparza's twenty-ninth claim is that the state's failure to inform him of his *Miranda* rights prior to being interviewed for the pre-sentence investigation report was a violation of his constitutional rights. Esparza's thirty-sixth claim is that the state's failure to inform him of his *Miranda* rights prior to being interviewed for the psychological report violated his constitutional rights.

Esparza's thirtieth claim is that pre-sentence investigation report impermissibly commented on Esparza's exercise of his right not to testify. Esparza's thirty-fifth claim is that the psychological report impermissibly commented on Esparza's exercise of his right not to testify.

Esparza's thirty-first claim is that the pre-sentence investigation report impermissibly contained numerous non-statutory aggravating circumstances. These circumstances are: (1) Esparza was not employed and had never held steady employment, (2) Esparza's criminal record "escalated rapidly," (3) prior incarcerations did not deter his criminal behavior, (4) Esparza fathered a child out-of-wedlock, (5) most of the mitigating factors were not present, (6) an earlier pre-sentence report did not support Esparza's claimed history of drug abuse, (7) Esparza exercised his right to remain silent, and (8) that Esparza made "claims" of innocence. Also, Esparza again asserts that the report contained inaccurate information about his intelligence – that he had average intelligence – when, in actuality, his intelligence level is low.

Esparza's thirty-seventh claim is that psychological report impermissibly contained numerous non-statutory aggravating circumstances. Esparza claims that these

circumstances were: (1) the report discussed his prior criminal record and commented on "the apparent escalation of aggressive acting out," (2) Esparza had a fairly high likelihood of committing future similar criminal acts, (3) he and his friends would set garbage cans on fire, (4) Esparza's discussion of his prior offenses, (5) Esparza's discussion of his experience with alcohol and drugs, (6) Esparza's 'vehement' denial of the offense, (7) evidence of disciplinary infractions while in jail, and (8) evidence to rebut mitigating factors that Esparza did not raise.

Esparza's thirty-second claim is that the jury was repeatedly informed of his prior juvenile and adult criminal record in violation of his constitutional rights.

Esparza's thirty-third claim is that the trial court impermissibly admitted a psychological report with the pre-sentence investigation report which had not been prepared pursuant to the required procedures. Specifically, Esparza claims that, because of lack of adequate time to prepare the report, no social worker was involved, no records were sought or obtained from other institutions or agencies except the Probation Department and Prosecutor's office, no psychiatrist was involved, the two psychologists conducted a joint interview of petitioner, rather than separate interviews, and that those who prepared the report relied on illegible records.

Esparza's thirty-fourth claim is that the psychological report impermissibly contained his prior record.

Esparza's thirty-eighth claim is that the trial court impermissibly admitted the testimony of a psychologist who stated that Esparza has an anti-social personality that causes him to deny his guilt.

Esparza's forty-first claim is that the admission of improper rebuttal testimony of an author of the psychological report to the effect that no mitigating factors existed was a violation of his constitutional rights.

Finally, Esparza's forty-second claim is that the introduction of non-statutory aggravating factors throughout the sentencing phase violated his constitutional rights.

Respondent has not specifically argued that these claims were procedurally defaulted. In fact, respondent contained his entire argument on the procedural default of these claims to the unsupported statement that "[m]any are subject to procedural default." The claims concerning the pre-sentence investigation report have certainly multiplied since Esparza argued them in the Ohio Courts, and no doubt many of them are procedurally defaulted. However, because procedural default is an affirmative defense, the Court finds that respondent has not met its burden in alleging procedural default. Therefore, the Court will examine these claims on the merits.

Esparza's claims concerning the pre-sentence investigation and psychological report can be reduced to three general arguments asserting more specific constitutional violations. The first argument is that the statements obtained from Esparza that were later included in these reports were obtained in violation of Esparza's Fifth Amendment right against self-incrimination because he was not warned that his statements may be used against him in the sentencing phase. The second argument is that the information included within these reports constituted non-statutory aggravating factors and thus was prejudicial to the defendant in violation of his Eighth and Fourteenth Amendment Rights. The third argument is that the psychologists did not follow the correct procedures in creating the pre-sentence investigation report.

Although the Court is concerned with the extreme and seemingly unnecessary damage that the pre-sentence investigation and psychological report caused Esparza, and the fact that these reports appear to present a trap for unwary and unenlightened defense attorneys, the Court finds these arguments, at least as presented in this section, lack merit.

As to the first argument, Esparza waived his Fifth Amendment right against self-incrimination when he requested the pre-sentence investigation under Ohio Rev. Code § 2929.03. Esparza requested the report so that it would be introduced into evidence during the sentencing phase of the trial in order to help prove mitigating factors. Esparza knew or should have been told by counsel that the full contents of what he discussed with the psychologists could potentially be admitted, whether or not it was helpful to his defense. *See State v. Buell*, 489 N.E.2d 795, 808 (Ohio 1986) (results of a mental examination as requested under Ohio Rev. Code § 2929.03 are made available to all parties including the judge and the jury). Esparza, knowing that the reports were created in order to be admitted into evidence during the sentencing phase, thereby waived his Fifth Amendment right against self incrimination as to the material gathered in the report. Although the Fifth Amendment would be violated if a court *orders* a defendant to undergo a psychiatric examination without informing the defendant that his statements can be used against him, and then admits his statements into evidence during the sentencing phase in order to prove statutory aggravating circumstances, *see Estelle v. Smith*, 451 U.S. 454, 468 (1981), the Fifth Amendment is not violated if the defendant requests the psychiatric evaluation himself and voluntarily submits to it.

> A criminal defendant, who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence, may not

> be compelled to respond to a psychiatrist if his statements can be used against him at a capital sentencing proceeding. This statement leads logically to another proposition: if a defendant requests such an evaluation or presents psychiatric evidence of such an evaluation, then, at the very least, the prosecution may rebut this presentation with evidence from the reports of the examination that the defendant requested. The defendant would have no Fifth Amendment privilege against the introduction of this psychiatric testimony by the prosecution.

Buchanan v. Kentucky, 483 U.S. 402, 422-423 (1987). In this case, Esparza *requested* the pre-sentence investigation report, which included a psychological report, in order to help prove mitigating factors in the sentencing hearing. Esparza thus had no Fifth Amendment privilege against the introduction of that evidence in the sentencing phase of the hearing. Further, Esparza's Fifth Amendment rights were not violated by the state calling Dr. Cassel, one of the psychologists who participated in the psychological report, as a rebuttal witness and asking her to discuss the absence of the statutory mitigating factors. Under *Buchanan*, the State is permitted to rebut the presentation of psychiatric evidence from the report itself. Therefore, the whole of the report could be admitted into evidence without violating the Fifth Amendment even if the defendant did not agree beforehand to that specific procedure. Here, where the law apparently dictated that the entire report be admitted and petitioner was or should have been aware of that fact, the petitioner cannot show a constitutional violation because damaging information from the reports was admitted along with the mitigating information. Nor can he show that the cross-examination of one of the professionals who prepared the

report in order to elicit the existence or non-existence of any mitigating factors was improper.

The fact that Esparza's counsel requested the pre-sentence investigation report, however foolhardy that request, militates against finding a violation of Esparza's Sixth Amendment right to counsel on the theory that the pre-sentence investigation report circumvented Esparza's counsel's control of Esparza's defense. The Sixth Amendment right to counsel will be violated if a court orders a psychiatric evaluation without notifying counsel. *See Powell v. Texas*, 492 U.S. 680 (1989), *Satterwhite v. Texas*, 486 U.S. 289 (1988). In Esparza's case, however, his counsel was not only notified of the evaluation, but requested it himself. Esparza's Sixth Amendment right to counsel, therefore, was not violated in this respect.[59]

Esparza's second main argument is that the information contained within the pre-sentence investigation and psychological report contained impermissible evidence and non-statutory aggravating factors. Esparza contends that the reports impermissibly: (1) emphasized his prior criminal record, (2) included probation reports and disciplinary infractions Esparza committed while in custody, (3) revealed he was not employed and had a child out of wedlock, (4) depicted his criminal record as "escalat[ing] rapidly," and, (5) proclaimed that his prior incarceration had a lack of deterrent effect. The reports contained the psychologists' conclusions that Esparza's "acting out" was escalating, and that a fair likelihood existed that he would commit similar future acts. They related that he and his friends set garbage cans on fire,

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[59] Whether counsel's performance was deficient by virtue of this request is an issue that will be addressed later in this Opinion.

and that he had an anti-social personality that caused him to deny his guilt. The report also contained inaccurate information about his level of intelligence and his history of substance abuse. Finally, the reports commented on the fact that Esparza exercised his right to remain silent during trial. Esparza argues that many of these items were used by the jury as non-statutory aggravating factors, instead of factors militating in favor of mitigation. The Court finds that, while it was error for the trial court not to examine the report and redact inaccurate, unduly prejudicial or completely irrelevant material before submitting the report to the jury, *see* Ohio R. Evid. 403, it was not error of a constitutional magnitude.[60]

In Ohio, a death penalty trial is a bifurcated proceeding: the guilt phase of the trial is separate from the sentencing phase of the trial. *See* Ohio Rev. Code § 2929.03. The proceeding is constructed this way to shield the jury, during the guilt phase, from information that might impermissibly affect their decision whether the defendant committed the crime. During the sentencing phase, though, it is necessary that the jury hear information that would be prejudicial during the guilt phase, so they may fashion a sentence tailored to the defendant's individual circumstances. The Supreme Court's propensity is to allow a wide scope of

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[60] In *State v. Esparza*, 529 N.E.2d 192, 201 (Ohio 1988), Justice Herbert Brown, joined by Justice Wright dissented from the majority opinion because they believed the trial court erred by admitting the complete pre-sentence investigation and psychological report without considering the prejudicial consequences of the information contained therein. Those justices were particularly concerned with the points Esparza raises here – the inclusion of information which constituted non-statutory aggravating factors and of conclusions by psychologists which invaded the province of the jury.

evidence in for the judge and jury's consideration during the sentencing phase. In *Gregg v. Georgia*, 428 U.S. 153, 204 (1976) the Court expressly rejected the defendant's contention that the scope of the evidence admitted during the sentencing phase was too broad. The Court stated:

> We think that the Georgia court wisely has chosen not to impose unnecessary restrictions on the evidence that can be offered at such a hearing and to approve open and far reaching arguments. So long as the evidence introduced and the arguments made do not prejudice the defendant, it is preferable not to impose restrictions. We think it desirable for the jury to have as much information before it as possible when it makes the sentencing decision.

Id. In Esparza's case, there was certainly a wide scope of evidence admitted during the sentencing phase. Much of this evidence was damaging to Esparza. It would be impossible to conclude that this evidence did not enter into the jury's calculations on whether to impose the death penalty or affect the outcome of their determination in this regard. However, the question here is not whether this information was damaging to Esparza, or even whether a proper balancing of the prejudicial effect of that evidence with its probative value would justify precluding some of this information under the Rules of Evidence (which the Court believes it would); the question is whether allowing this information into evidence during the sentencing phase was so prejudicial as to violate Esparza's constitutional rights.

Esparza alleges that much of this evidence was used as non-statutory aggravating factors by the jury. Under Ohio law, the death penalty may not be imposed unless certain

statutory aggravating factors are "specified in the indictment" and "proved beyond a reasonable doubt." Ohio Rev. Code § 2929.04. "Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty... the jury then is free to consider a myriad of factors to determine whether death is the appropriate punishment." *California v. Ramos*, 463 U.S. 992, 1008 (1983). In Ohio, after the aggravating factor or factors have been proven, the court or jury is, indeed, free to consider a wide variety of factors.[61] The statute states that the sentencing jury or judge must "weigh against the aggravating circumstances proved beyond a reasonable doubt, the nature and circumstances of the offense, the history, character and background of the offender[,]" the statutory mitigating factors and all other mitigating factors. Ohio Rev. Code § 2929.04. While the Court is amazed at the scope of what the probation officer saw fit to put into the pre-sentence investigation report, raising questions about whether the probation officer was acting more as an advocate than an officer of the court, much of the evidence that came in through that report illustrated factors that the jury, generally, is entitled to consider under the Ohio statutory scheme – that is the nature and circumstance of the offense and the history, character and background of the offender.

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[61] This Court has already concluded that the first phase of this capital scheme never actually occurred in this case, rendering the sentencing or mitigation phase improper in its entirety. For purposes of this discussion, the Court assumes that its earlier conclusion was in error and that it was, accordingly, appropriate to instruct the jury that a statutory aggravating circumstance had been established by virtue of Esparza's conviction.

The Ohio Supreme Court dispensed with the allegation that the report contained non-statutory aggravating factors by pointing out that "the jury was properly instructed as to the aggravating circumstances and mitigating factors it was to consider." *Esparza v. State*, 529 N.E.2d 192, 195 (Ohio 1988). This Court is to presume that the jurors followed the trial court's instructions. *See Richardson v. Marsh*, 481 U.S. 200 (1987). Indeed, Esparza does not provide any facts or evidence to undermine the presumption that the jury properly weighed the evidence when determining his sentence.

Even if the jury did consider this evidence as an aggravating factor, there still would be no constitutional violation. In *Zant v. Stephens*, 462 U.S. 862 (1983), the Supreme Court found that consideration of a non-statutory aggravating circumstance, although against state law, did not offend the Constitution when there were two other statutory aggravating circumstances that the jury could have relied upon:

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. What is important at the selection stage is an individualized determination on the basis of the character of the individual and the circumstances of the crime.

Id. at 879-880. Here, the factors that the jury may have considered in the pre-sentence investigation and psychological reports were not only permitted under the Constitution, they are permitted under Ohio law.

There is no merit, moreover, to Esparza's claim that it is unconstitutional for the jury to consider his prior record or the disciplinary infractions he received while incarcerated. "Nothing in the United States Constitution prohibits a trial judge from instructing a jury that it would be appropriate to take account of a defendant's prior criminal record in making its sentencing determination, even though the defendant's prior history of noncapital convictions could not by itself provide sufficient justification for imposing the death sentence." *Zant*, 462 U.S. at 888. *See Barclay v. Florida*, 463 U.S. 939, 958 (1983) (holding it is not unconstitutional for a Florida court to have considered prior record as an aggravating circumstance even though it was not an aggravating circumstance under Florida Law);*see also Romano v. Oklahoma*, 512 U.S. 1, 12 (1994) ("The Eighth Amendment does not establish a federal code of evidence to supersede state evidentiary rules in capital sentencing proceedings.")

Esparza argues that it was improper for the jury to hear false information through the pre-sentence investigation and psychological reports. He points specifically to the allegedly misleading information that his intelligence level was average when it was actually low and also the alleged misrepresentation of his history of drug abuse. Esparza relies on *Johnson v. Mississippi*, 486 U.S. 578 (1981) for the proposition that the jury is not allowed to "consider evidence that has been revealed to be materially inaccurate." *Id.* at 579. In *Johnson*, however, the evidence relied upon was the statutory aggravating factor of a prior conviction that had later been overturned. A prior conviction is capable of being

verified as accurate or inaccurate. Here, psychologists and probation officers may disagree on how to characterize Esparza's intelligence level, and his history of drug abuse is not a fact that is subject to verification. These allegedly misleading facts are neither severe enough nor concrete enough to be deemed "materially inaccurate." Moreover, the Supreme Court has since commented, "[c]ontrary to petitioner's assertion, *Johnson* does not stand for the proposition that the mere admission of irrelevant and prejudicial evidence requires the overturning of a death sentence." *Romano v. Oklahoma*, 512 U.S. 1, 11 (1994). The Court, therefore, finds no merit to these allegations.

Finally, Esparza claims that the pre-sentence investigation and psychological report impermissibly commented on the exercise of his right not to testify at trial. The Court scoured the report and could not find a single place that commented on Esparza not testifying at trial. Notably, Esparza does not point the Court to a single page, or phrase, where this supposed impermissible recounting occurred. The Petition only refers to a part of the report stating that Esparza "refused to talk about the circumstances" of prior offenses. Petition at p. 59. In reality, the report states that "he refused to talk about the circumstances involved in this latter offense" referring specifically to a prior Attempted Robbery charge. *See* Psychological Report. This sentence cannot logically be linked to any refusal on Esparza's part to testify in the current proceedings. Because there is no support for the allegation that the psychological report impermissibly commented on Esparza's right not to testify, the Court finds this claim to be without merit.

Esparza's third general argument is that the procedures for the pre-sentence investigation and psychological reports were not followed and that there were many factors that should have been considered in these

reports that were ignored. As discussed in claim twenty-four, Esparza was not constitutionally entitled to a psychologist to aid with the mitigation proceedings. *See Estelle v. Smith*, 451 U.S. 454 (1981); *Buchanan v. Kentucky*, 483 U.S. 402 (1987). Because there is no constitutional guarantee to a psychologist in this situation, the threshold for the inadequate assistance of an expert psychologist must necessarily be quite low. Although the Court will not go so far as to say that nothing that the psychologists could have done could rise to the level of constitutional error because their presence was not constitutionally mandated, the Court does not find that any constitutional error exists in this case. Esparza is not entitled to a psychologist of his choosing, and he is not entitled to a favorable opinion from the psychologist that is chosen for him. *See Ake v. Oklahoma*, 470 U.S. at 83. The fact that the psychologists did not follow state procedures (which they clearly did not) does not, in and of itself, give rise to constitutional implications. Although the psychologists did not do the most thorough and comprehensive job in this case, a fact that is particularly troubling and disappointing considering the gravity of the task with which they were charged, this Court is not prepared to say that their failure to follow state procedures and careless work could, by itself, provide a basis for granting habeas.[62] The Court, therefore, finds that these claims are not well-taken.

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[62] The many errors and inadequacies in the report do lend support to petitioner's contention that the trial court erred when it failed to allow adequate time for preparation of the report. That is a separate claim, however, and will be analyzed as such.

4. Esparza's Fortieth Claim for Relief

Esparza's fortieth claim is that the admission of the victim's photograph during the sentencing phase violated his constitutional rights. The trial court admitted into evidence a photograph of the victim and her daughter in front of the American flag. The prosecutor also made several statements about the pain and loss of the victim's friends and family. Esparza objects to this evidence because "the use by the State of evidence of the victim's background, and reliance upon such evidence in its argument for the death penalty, is improper and constitutes error...[because it] serves to inflame the passion of the jury with evidence collateral to the principal issue at bar." *State v. White*, 239 N.E.2d 65 (Ohio 1968).

The Constitution, however, provides no bar to the admission of victim impact statements during the sentencing phase of a trial. The Supreme Court has held "that if the state chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no per se bar." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991) (cited in *State v. Hill*, 661 N.E.2d 1068, 1076 (Ohio 1995)). "There is nothing unfair about allowing the jury to bear in mind that harm [to the victim and the victim's family] at the same time as it considered the mitigating evidence introduced by the defendant." *Id. See also Byrd v. Collins*, 209 F.3d 486, 531-32 (6th Cir. 2000). Therefore, the introduction of the victim's photograph to the jury, and the statements by the prosecutor reminding the jury of the victim and her family, even if violative of state law, did not violate Esparza's constitutional rights.

5. Esparza's Forty-Third Claim for Relief

Esparza's forty-third claim is that the trial court improperly excluded mitigating evidence at the sentencing hearing. Specifically, Esparza claims that the trial court excluded a letter which he wrote to his foster parents expressing his desire to rehabilitate himself and support his children. Esparza also claims that the trial court precluded one of the psychologists who helped prepare the psychological report from testifying regarding the existence of mitigating factors.

Respondent does not argue that these claims were procedurally defaulted. The Court, therefore, addresses these claims on their merits.

Esparza asserts that it was unconstitutional to preclude the jury from hearing the psychologist's opinion as to the presence of mitigating factors. Whether or not this is true, Esparza misrepresents the record when stating this claim because the jury was not precluded in this case from hearing the psychologist's opinion on those factors. The psychologist was asked by the defense whether there were any mitigating factors available to Esparza. The trial judge sustained an objection to this question because it called "for a multiple conclusion of the witness for a matter that is reserved for the jury." Tr. T. V. p. 108. Esparza's counsel then questioned the psychologist as to the presence of each individual mitigating factor that Esparza wished to raise. See Tr. T. V. p. 108-112. The psychologist freely gave his opinion about each of these mitigating factors. The opinion of the psychologist as to each of these mitigating factors was in no way precluded despite the ruling on the initial objection to that line of questioning. This portion of the claim is, thus, without merit.

As to the claim that Esparza's letter was unconstitutionally precluded from consideration by the jury, both the Appellate Court and the Supreme Court squarely addressed this issue. Both found that this claim was not well-taken. Therefore, this claim was not procedurally defaulted.

The United States Supreme Court has strongly suggested that all relevant mitigating factors must be considered by a death-sentence jury. In *Eddings v. Oklahoma*, 455 U.S. 104 (1982), the Court held that the trial court violated the defendant's Eighth Amendment rights by refusing, as a matter of law, to evaluate all the evidence of mitigation. The trial court considered the youth of the offender in imposing the death sentence, but refused to consider the fact that the defendant had been physically abused and was emotionally disturbed. *Id.* at 108-109. The Supreme Court restated the relevant rule several times in overturning the imposition of the death penalty:

> We concluded that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

Id. at 110 (*quoting Lockett v. Ohio*, 438 U.S. 586, 604 (1976).

If, after *Eddings* and *Lockett*, any question about the relevance of mitigating evidence remained, it was resolved in *Sumner v. Shuman*, 483 U.S. 66 (1987). There, the defendant, an inmate serving a life sentence who, after killing another inmate in prison, was not allowed to introduce any mitigating factors and a death sentence was imposed. The

Court found this unconstitutional because the sentencing authority must be permitted to consider any relevant mitigating evidence before imposing a death sentence. *Id.* at 76.

The Sixth Circuit has reiterated the strong constitutional concern over precluding a defendant from presenting mitigating evidence. In a recent case, the Sixth Circuit found that it was error for an Ohio trial court to prohibit a jury from considering mitigating evidence relating to a prior murder conviction. *Mapes v. Coyle*, 171 F.3d 408, 418 (6th Cir.1999).

In this matter, the Ohio Court of Appeals upheld the trial court's decision to exclude the defendant's letter, finding that the letter was irrelevant. The letter was written while Esparza was incarcerated on the charge leading to his conviction of aggravated murder three weeks prior to the original trial date. The appellate court noted that the United States Supreme Court had not limited "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense." *State v. Esparza*, No. L-84-225, 1986 WL 9101 *15 (Ohio App. Aug. 22, 1986) (*quoting Lockett v. Ohio*, 438 U.S. 584, 604 (1978)). The appellate court stated that "[a]ny relevance the letter may have to appellant's character is outweighed by its unreliability; the circumstances under which the letter was written are suspect." *Id.*

The Ohio Supreme Court affirmed the appellate court's decision. It found that the letter was irrelevant because the circumstances under which it was written "indicate a lack of trustworthiness." *State v. Esparza*, 529 N.E.2d 192, 198 (Ohio 1988). The court stated, "[d]ue to the likelihood that this letter was written for the purpose of

communicating a statement to the jury, its exclusion as irrelevant was proper. Moreover, exclusion of the letter was harmless given the other testimony of appellant's continued family contacts which was presented to the jury by appellant's foster father." *Id.*

This Court may not grant a writ of habeas corpus "with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254 (d)(1). *See* Discussion, *supra*, at Part V, pp. 14-17. The Court does not find that the Ohio courts unreasonably applied federal law. Although it is true that a defendant has the right to present any and all mitigating evidence during the sentencing phase of the hearing, this does not mean that the defendant can submit irrelevant and untrustworthy information. In this case, Esparza was not precluded from arguing the existence of a mitigating *factor - i.e.*, that he desired to rehabilitate himself, he was only prohibited from introducing one form of *evidence* to support that mitigating factor, a letter. Because this Court does not find the Ohio courts' conclusion that the letter was irrelevant is an unreasonable application of federal law, this claim is without merit.

6. Esparza's Forty-Fifth Claim for Relief.

Esparza's forty-fifth claim is that the prosecutor's misconduct during the sentencing phase violated his constitutional rights. Because respondent does not argue that these claims are procedurally defaulted, they will be addressed on the merits.

Esparza alleges numerous instances of prosecutorial misconduct. They can be reduced, though, to six general

areas of alleged misconduct. First, the prosecutor referred to non-statutory aggravating circumstances, including the facts of the case, and argued that mitigating circumstances were actually aggravating. Second, the prosecutor referred to a statutory aggravating circumstance of which the defendant was not found guilty. Third, the prosecutor referred to Esparza's future dangerousness. Fourth, the prosecutor argued that Esparza's proffered mitigating factors did not mitigate his crime. Fifth, the prosecutor referred to other individuals with similar backgrounds who did not commit crimes. Sixth, the prosecutor made repeated references to the victim.

When a petitioner seeks relief through habeas corpus based on improper prosecutorial comments, it "is not enough that the prosecutor's remarks were undesirable or even universally condemned. The relevant question is whether the prosecutor's comments 'so infected the trial with unfairness as to make the resulting conviction a denial of due process.'" *Darden v. Wainwright*, 477 U.S. 168, 181 (1986) (citations omitted).[63] This question must be answered in light of the totality of the circumstances in the case. *Lundy v. Campbell*, 888 F.2d 467, 473 (6th Cir. 1989), *cert denied*, 495 U.S. 950 (1990).

In the Sixth Circuit, a court is to engage in a two-stage process to determine whether a prosecutor's statements entitle a defendant to relief. *See e.g. U.S. v. Francis*, 170 F.3d. 546, 552 (6th Cir. 1999) (setting forth two-step procedure). First, the Court must determine whether the prosecutor's statements were improper. *U.S. v. Cobleigh*, 75 F.3d 242, 247 (6th Cir. 1996). "Then if improper, the court

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[63] Whether the prosecutor engaged in unconstitutional misconduct is a mixed question of fact and law. See *United State v. Clark*, 982 F.2d 965, 968 (6th Cir. 1993).

must determine if the impropriety was flagrant . . ." *Id.* at 247 (citations omitted). *See also Francis* at 552. The Court considers the following four factors in evaluating whether the statements were flagrant:

> (1) whether the remarks tended to mislead the jury or to prejudice the accused [including whether the trial judge gave an appropriate cautionary instruction to the jury];
> (2) whether they were isolated or extensive;
> (3) whether they were deliberately or accidentally placed before the jury; and
> (4) the strength of the evidence against the accused.

See Byrd v. Collins, 529 F.3d 486, 529 (6th Cir. 2000). "To constitute a denial of due process, the misconduct must be so pronounced and persistent that it permeates the entire atmosphere of trial." *Id.* (internal quotations removed). Only if the comments were both improper and flagrant will the petitioner be entitled to relief. "The touchstone of due process analysis in cases of alleged prosecutorial misconduct is the fairness of the trial, not the culpability of the prosecutor." *Smith v. Phillips*, 455 U.S. 209, 219 (1982).

First, Esparza claims that the prosecutor argued non-statutory aggravating factors. Here, Esparza refers to several comments made by the prosecutor about the nature and circumstances of Esparza's crime. Esparza contends that these are not valid aggravating circumstances under Ohio law. The Ohio Supreme Court does not agree with Esparza's contention. "[A] prosecutor may incorporate proven facts surrounding a murder into the state's closing arguments even when these proven facts could increase rather than decrease the likelihood that a sentence of death will ultimately be recommended." *State v. Hill*, 661 N.E.2d 1068, 1076 (Ohio

1996). As well as not offending Ohio law, the prosecutor's arguments do not violate any federal constitutional right. As we have already explained, a wide scope of evidence may be considered during sentencing. *See Gregg v. Georgia*, 428 U.S. 153, 204 (1976); *Zant v. Stephens*, 462 U.S. 862 (1983). There is no constitutional prohibition against mentioning the facts of the crime during sentencing. *Id.* Therefore, this claim is without merit.

Second, Esparza argues that the prosecutor referred to other statutory aggravating factors of which the defendant was not found guilty. Specifically, Esparza alleges that the prosecutor stated that Esparza shot the victim in order to escape detection and referred to aggravating circumstances in the plural form, where there was, at best, only one proven aggravating circumstance. Esparza has again alleged no constitutional violation. There is no constitutional prohibition to mentioning the circumstances of the crime. *See Gregg v. Georgia*, 428 U.S. at 204. And, there appears to be no prohibition against asking the jury to draw inferences from those circumstances. As for the prosecutor's reference to *circumstances*, in the plural form, this Court does not find that this reference was so improper as to result in an unfair trial or to taint the jury's sentencing determination. The jury was instructed that they were to weigh the aggravating circumstance of Esparza's conviction for murder committed during the course of an aggravated robbery against any mitigating factors.[64] The prosecutor's few stray comments do not overcome the presumption that the jury followed the trial court's instructions.

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[64] Again, the Court assumes, for purposes of this discussion, that the aggravating circumstance described to the jury in this case was sufficient to justify imposition of the death penalty, though, as the Court previously found, it was not.

Third, the prosecutor made repeated references to Esparza's future dangerousness. While these comments may have been improper, in light of Ohio law, there is no *constitutional* prohibition to considering future dangerousness in a sentencing procedure. In fact, many states expressly consider this as a factor. *See Estelle v. Smith*, 451 U.S. 454, 458 (1981) (Texas requires a sentencing jury to consider the defendant's future dangerousness).

Fourth, Esparza claims a hodge-podge of improper innuendos and unfair argument on the part of the prosecutor that demeaned mitigating evidence or the mitigation procedure. Many of these statements are argued to be improper only because they imply that the jury should not give weight to Esparza's mitigating evidence. While these comments were largely unnecessary and may, in conjunction, constitute error, the Court does not find that any of these statements were constitutionally infirm, nor does Esparza argue that any of these statements violate the federal constitution. Further, even if these statements were improper, they most assuredly did not "so infect the trial with unfairness as to make the resulting conviction a denial of due process." *Darden v. Wainwright*, 477 U.S 168, 181 (1986).

Fifth, the prosecutor compared Esparza to other individuals from similar backgrounds and with similar hardships who are law-abiding citizens. Esparza claims that this comparison impaired his right to individual consideration in the sentencing process. While a defendant is entitled to individual consideration, *see McCleskey v. Kemp*, 481 U.S. 279 (1987), individual consideration is not necessarily hampered by the suggestion at issue here. Nor does Esparza offer any support for his argument that an impairment of individuality is always the logical result of such a suggestion.

Sixth, the prosecutor made references to the victim and the victim's family's loss. As discussed earlier, there is no constitutional prohibition to a consideration of the victim during the sentencing phase. *See Payne v. Tennessee*, 501 U.S. 808, 827 (1991). *See also Byrd v. Collins*, 209 F.3d 486, 532 (6th Cir. 2000).

The Court concludes that the prosecutor's comments to which Esparza objects, even though at times improper, did not deny Esparza due process or inject any fundamental unfairness into the trial. Therefore, Esparza's forty-fifth claim is not well taken.

7. Esparza's Forty-Seventh Claim for Relief

Esparza's forty-seventh claim is that the trial court's and prosecutor's admonishments to the jurors that any death verdict was only a recommendation unconstitutionally diminished the jury's responsibility for imposition of the death penalty. Respondent does not allege that this claim is procedurally defaulted. The claim was, in fact, asserted on direct appeal. *See State v. Esparza*, No. L-84-225, 1986 WL 9101 *7 (Ohio App. Aug. 22, 1986). Therefore, the Court will address this claim on its merits.

Esparza points to four different occasions during voir dire and at the beginning of the sentencing phase when either the prosecutor or the trial judge told the jurors that the penalty that they decided upon was a recommendation. Esparza also points to the jury instruction that the trial court delivered at the close of the sentencing phase. The challenged instruction is quoted below:

> If all twelve members of the jury find, by proof beyond a reasonable doubt, that the

aggravating circumstances which Gregory Esparza was found guilty of committing outweighs the mitigating factors, then you must return such finding to the Court. I instruct you as a matter of law that if you make such a finding, then you have no choice and must recommend to the Court that the sentence of death be imposed upon the defendant, Gregory Esparza.

A jury recommendation to the Court that the death penalty be imposed is just that—a recommendation, and is not binding upon the Court. The final decision as to whether the death penalty shall be imposed upon the Defendant rests upon this Court.

In the final analysis, after following the procedures and applying the criteria set forth in the statute, I will make the decision as to whether the Defendant, Gregory Esparza, will be sentenced to death or to life imprisonment.

Now, on the other hand, if...you find that the State of Ohio failed to prove that the aggravating circumstances which the defendant, Gregory Esparza, was found guilty of committing, outweigh the mitigating factors, then you will return your verdict indicating your decision. In this event, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.

Your recommendation to the Court shall be one of the following: One, that Gregory Esparza be sentenced to life imprisonment with parole eligibility after 20 full years of imprisonment; Or, second, that Gregory Esparza be sentenced to life imprisonment with a parole eligibility after 30 full years of imprisonment.

This particular recommendation that you make involving life imprisonment is binding upon the Court, and I must impose the specific life imprisonment which you have recommended.

T. Vol. V. pp. 214, 215 (emphasis added). As Esparza notes, this instruction draws a clear contrast between the jury's decision to recommend a sentence of death versus a decision to recommend a sentence of life imprisonment: a recommendation of death is not binding, while a recommendation of life imprisonment is.

Esparza insists this instruction unconstitutionally misled the jury, because it impermissibly alleviated the jury's responsibility for its decisions, citing *Caldwell v. Mississippi*, 472 U.S. 320 (1985). The *Caldwell* Court concluded that the defendant's death sentence was unconstitutional, because "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere." *Id.* at 328-29. Esparza relies on this language and argues that the trial court's instruction impermissible led the jury to believe that final responsibility for determining whether Esparza should suffer a death sentence lay with the judge, and not with the jury themselves.

Esparza cannot prevail on this claim because, unlike *Caldwell*, the trial judge's instructions did not mislead the jury and are an accurate statement of Ohio law. *See Scott v. Mitchell*, 209 F.3d 854, 877 (6th Cir. 2000); *Mapes v. Coyle*, 171 F.3d 408, 414-415 (6th Cir. 1999).

> *Caldwell* is limited to situations in which the jury is misled as to its role in a way that allows it to feel less responsible than it should for the sentencing decision. Thus, to establish a *Caldwell* violation a defendant must necessarily show that the remarks to the jury improperly described the role assigned to the jury by local law.

Id. (*citing Romano v. Oklahoma*, 512 U.S. 1, 9 (1994) (quotations omitted). *Scott* and *Mapes* both found the exact instruction with which Esparza takes issue, to accurately describe Ohio law. *See id.; Mapes*, 171 F.3d at 414-15.

8. Esparza's Forty-Eighth and Forty-Ninth Claim for Relief

Esparza's forty-eighth claim is that the instructions given to the jury during the sentencing phase violated his constitutional rights. Esparza's forty-ninth claim is that instructions given to the jury during the sentencing phase, viewed in their entirety, mandated a sentence of death.

Esparza lists a total of six jury instructions he contends are improper, and two jury instructions that should have been given but were not. These allegedly impermissible instructions are: (1) Esparza bore the burden of proof at the mitigation phase; (2) the state's burden of proof was met if the jurors were firmly convinced of the truth of the charge;

(3) the aggravating circumstances must "outweigh" the mitigating factors; (4) sympathy could play no part in the jury's decision; (5) the jury could consider the quantity of the aggravating circumstances when there was only one aggravating circumstance; and, (6) unanimity was required for the imposition of either of the two life sentence verdicts.

Esparza alleges that these instruction should have been given but were not: (1) lingering doubt could be considered as a factor in sentencing; and, (2) the jury could exercise mercy even if aggravating circumstances outweigh mitigating factors.

a. Procedural Default.

Respondent alleges that all of these claims are procedurally defaulted but one, claim number four, the instruction given to the jury to disregard sympathy. The Court agrees with respondent.

Esparza argued on both direct appeal and before the Supreme Court of Ohio that it was error to instruct the jury to disregard sympathy. Both courts addressed the claim concerning the disregard of sympathy on its merits. *See State v. Esparza*, No. L-84-225, 1986 WL 9101, at *9 (Ohio App. Aug. 22, 1986); State v. Esparza, 529 N.E.2d 192, 197 (1988). This claim is, therefore, not procedurally defaulted.

Esparza also raised his jury unanimity claim on direct appeal, but the Ohio Courts found that Esparza waived the jury unanimity issue pursuant to Crim. R. 30(A), because he did not specifically object to the instruction at trial court in a timely manner. *See State v. Esparza*, No. L-84-225, 1986 WL 9101, at *9 (Ohio App. Aug. 22, 1986). Esparza's claim is, thus, procedurally barred as the Court concludes that Esparza cannot overcome any of the four prongs of *Maupin*.

See Scott v. Mitchell, 209 F.3d 854, 864-72 (6th Cir. 2000). Esparza did not raise the rest of these claims on direct appeal, or in front of the Supreme Court. Thus, the rest of the claims are procedurally defaulted.

The Court will first address the jury sympathy instruction on its merits, because that claim has not been procedurally defaulted. The Court will then briefly address the procedurally defaulted claims on their merits to determine whether they could provide a basis for Esparza's later ineffective assistance of appellate counsel claims.

b. Jury Sympathy.

Esparza argues that it was improper to tell the jury that sympathy could play no part in its deliberations. Esparza contends that sympathy and mercy are legitimate considerations at the penalty phase in capital cases. The challenged instruction is quoted below:

> *You must not be influenced by any consideration of sympathy or prejudice.* It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the Court to your findings and to render your verdict accordingly. In fulfilling your duties, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality and *without bias, sympathy or prejudice* so that the State of Ohio and the Defendant will feel that their case was fairly and impartially tried.

Tr. T. p. 218 (emphasis added). Essentially, Esparza argues the two-fold instruction told jurors they should not allow

"sympathy" to influence them, while "sympathy" is precisely what mitigating factors are designed to invoke.

A death-sentenced defendant made a similar argument in *California v. Brown*, 479 U.S. 538 (1987), arguing that an instruction to the jury not to be swayed by "mere sentiment, conjecture, sympathy, passion, prejudice, public opinion or public feeling" was unconstitutional. *Id.* at 542. The Supreme Court rejected this argument, noting that "[e]ven a juror who insisted on focusing on [the phrase 'mere sympathy'] in the instruction would likely interpret the phrase as an admonition to ignore emotional responses that are not rooted in the aggravating and mitigating evidence introduced during the penalty phase." *Id.* Here, the trial court did not warn simply against feelings of sympathy, but directed the jury to "make your finding with intelligence and impartiality, without bias, sympathy, or prejudice, so that the [parties] will feel that their case was fairly and impartially tried." Read in its entirety, this instruction similarly warns jurors to ignore emotional responses that are not rooted in the evidence, including those emotional responses that might dispose the jury against the defendant. *See Scott v. Mitchell*, 209 F.3d 854, 878 (6th Cir. 2000) (finding no error in a similar instruction). Accordingly, this Court finds that this claim is not well-taken.

c. Procedurally Defaulted Claims raised in Petitioner's *Murnahan* Proceedings

To the extent these claims were raised at all, they were alleged as part of an ineffective assistance of appellate counsel claim in a *Murnahan* appeal. Therefore, this court will analyze the underlying merit of these defaulted claims to determine whether they could provide a basis for the ineffective assistance of appellate counsel claim.

i. Jury Unanimity Instruction

Esparza argues that he was unconstitutionally prejudiced by the instruction that unanimity was required for the imposition of either of the two life verdicts. Esparza claims that this instruction had the effect of unconstitutionally increasing the likelihood that the jurors would return a recommendation of death, because the trial court incorrectly suggested that the jury's recommendation – of either death or life imprisonment – must be unanimous. The challenged instruction is quoted below:

> *If all twelve members of the jury find*, by proof beyond a reasonable doubt, that the aggravating circumstance which Gregory Esparza was found guilty of committing outweighs the mitigating factors, then you must return such finding to the Court. I instruct you as a matter of law that if you make such finding, then you have no choice and must recommend to the Court that the sentence of death be imposed upon the Defendant, Gregory Esparza.
>
> ***
>
> Now, on the other hand, if, after considering all of the relevant evidence raised at trial, the testimony, other evidence, the reports prepared for this hearing, and the arguments of counsel, you find that the State of Ohio failed to prove that the aggravating circumstances which the defendant, Gregory Esparza, was found guilty of committing, outweigh the mitigating factors, then you will return your verdict indicating your decision.

> In this event, you will then proceed to determine which of two possible life imprisonment sentences to recommend to the Court.
>
> ***
>
> I am going to turn now to the verdict forms which apply in this case. I will read them and explain them. No inference is to be drawn by you from the order in which I read these forms to you.
>
> The first verdict form, and they are two in number, by the way, but the first verdict form that I will read to you is headed as being a "Verdict in Sentencing Proceedings." It also has, of course, the case name and the court name and the case number.
>
> It reads that, "We the jury in this cause, being duly impaneled and sworn, for verdict find and say that the aggravating circumstance which the defendant, Gregory Esparza, was found guilt of committing, does not outweigh the mitigating factors present in this case. Therefore, we, the said jury, recommend to the Court that the sentence of life imprisonment with parole eligibility after serving," there is a blank space for you to insert either twenty or thirty, "full years of imprisonment be imposed upon the Defendant Gregory Esparza." *Then there are twelve signature lines or signature bars for the signatures of the jurors concurring in such verdict.* The insertions must be in ink. The signatures must be in ink, and of course, to

arrive at a verdict in this proceeding, the same as in the earlier proceeding, *all twelve jurors must agree*.

You will note there is a special space for the foreman to sign. That is simply a matter of convenience to the Court.

The second verdict form has the same headings and reads, "We the jury in this cause, being duly impaneled and sworn, for verdict find and say that the aggravating circumstance which the defendant, Gregory Esparza, was found guilt of committing, does beyond a reasonable doubt outweigh the mitigating factors present in this case.

Therefore, we, the said jury, recommend to the Court that the sentence of death be imposed upon the Defendant Gregory Esparza."

There is no insertion, of course, necessary. If this is your verdict form selected again, the twelve signature lines or signature bars are there. One for the foreman, the rest for the balance of the jury. All signatures must be in ink. *And again, before any verdict is properly reached, all twelve jurors must concur therein.*

***

Now ladies and gentlemen of the jury, after you retire, first take care of the obligation about a foreman that I have mentioned to you. Wait for the evidence to be brought into you

along with the verdict forms and *whenever all twelve of you, and I repeat, all twelve jurors agree upon a verdict*, you will sign the verdict agreed upon in ink after, if necessary, making the proper insertions, and then you will advise the Court that you have arrive [sic] at the verdict.

Tr. T. V. pp. 214-222 (emphasis added).

Although the undersigned was originally of a contrary view, the Sixth Circuit recently found an instruction, essentially identical to the one above, to be constitutional. *See Scott v. Mitchell*, 209 F.3d 854, 876 (6th Cir. 2000).[65] The Sixth Circuit found that "nothing in [the language of the instruction] could be reasonably taken to require unanimity as the presence of a mitigating factor." *Id.* (*quoting Coe v. Bell*, 161 F.3d 320, 338 (6th Cir. 1998)). Therefore, this claim is without merit.

ii. Burden of Proof

Esparza claims that the trial judge improperly stated that the burden of proof was on Esparza during the mitigation phase. Esparza cites three instances where the trial judge allegedly misplaced the burden of proof. In two of these three instances the judge correctly stated that the burden of proof was on the State and not Esparza. In the last instance,

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[65] *Scott* was a decision affirming in part and reversing in part an order of this Court. This Court found this instruction to be constitutionally infirm under *Mills v. Maryland*, 486 U.S. 367 (1988), *Kubat v. Thieret*, 867 F.2d 351 (7th Cir. 1989) and *Kordenbrock v. Scroggy*, 919 F.2d 1091 (6th Cir. 1990) (en banc) as support for that conclusion. The Sixth Circuit disagreed with this Court's reasoning.

the statement of the trial court cannot reasonably be interpreted to concern the burden of proof.

In the first two instances about which Esparza complains, the court stated:

> In this hearing, this portion of the trial, the defense has the burden of going forward with any mitigating evidence. However, the burden of proof remains on the State of Ohio, and that will be addressed at the proper time. But because of the fact that there is that burden of going forward with the evidence, the defense will be presenting its evidence first, which is contrary to what you are used to. Tr. T. V. p. 25.

> The State of Ohio has the burden of proving by proof beyond a reasonable doubt that the aggravating circumstances which the Defendant, Gregory Esparza, was found guilty of committing is sufficient to outweigh the factors in mitigation of the imposition of the sentence of death. The Defendant has no burden of proof. His only burden is to go forward with the evidence. Tr. T. V. p. 211.

These instructions clearly place the burden of proof on the state. The burden to go forward with the evidence is difference from the burden of proof and the trial judge made this clear in his instructions. The petitioner ought to understand this distinction as well.

The last instance Esparza refers to occurred after the state rested. The court, in asking whether the defense desired to rebut the state's case, said "It is up to the defense if it has

anything further." This statement cannot be interpreted reasonably to mean that the trial court was placing the burden of proof on the defendant. This Court finds that the petitioner misrepresented the record in attempting to assert this claim, and, therefore, finds no merit to it.

iii. Reasonable Doubt Instruction

Second, Esparza contends that the instruction that the state's burden of proof was met if the juror's [sic] were firmly "convinced of the truth of the charge," was an unconstitutional presumption in favor of a death sentence, since the jurors had already found the charge to be "true" beyond a reasonable doubt during the guilt phase of the trial. Esparza argues that this impermissibly shifted the burden of proof to Esparza during the sentencing phase, and created a mandatory death penalty. Again, Esparza takes a few words out of context to create an issue where there is none. The jury instruction Esparza challenges is the court's definition of reasonable doubt. After the court correctly placed the burden of proof on the state to prove the aggravating circumstance beyond a reasonable doubt, the trial judge stated:

> Reasonable doubt is present when, after you have carefully considered and compared all the evidence, you cannot say you are firmly convinced of the truth of the propositions required to be proven. Reasonable doubt is not mere possible doubt, because everything relating to human affairs or depending on moral evidence is open to some possible or imaginary doubt. Proof beyond a reasonable doubt is proof of such character that an

> ordinary person would be willing to rely and act upon it in the most important of his own affairs.

Tr. T. V. p. 212. The court's definition of reasonable doubt is an acceptable and valid explanation of this standard. *See Scott v. Mitchell*, 209 F.3d 854, 883 (6th Cir. 2000); *Byrd v. Collins*, 209 F.3d at 486, 527-28 (6th Cir. 2000); *Thomas v. Arn*, 704 F.2d 865, 867-69 (6th Cir. 1983). *See also Victor v. Nebraska*, 511 U.S. 1, 8 (1994). Since this is a correct statement of the law, preceded by a correct statement of the state's burden, the Court does not perceive where any possible unconstitutionality could lie. Accordingly, the Court finds this claim equally without merit.

iv. Definition of "Outweigh"

Esparza next takes issue with the trial court's failure to provide a meaningful definition of "outweigh," when the court stated that aggravating circumstances must "outweigh" the mitigating factors. The trial court stated that "[t]o outweigh means to weigh more than, to be more important. The existence of mitigating factors does not preclude or prevent the death sentence if the aggravating circumstance outweighs the mitigating factors." Tr. T. V. p. 213. Esparza does not explain how the perceived lack of a further definition of "outweigh" is any threat to his constitutional rights. The Ohio sentencing scheme instructs jurors to "weigh against the aggravating circumstances proved beyond a reasonable doubt" the mitigating circumstances. Ohio Rev. Code § 2929.04(B). This instruction is clear enough without additional definition. Accordingly, this Court finds this portion of the claim not well-taken.

v. "Quantity of Aggravating Circumstance" Instruction

Next, Esparza claims that it was improper for the trial court to state that the jury could consider the "quantity of aggravating circumstance" when there was only one statutory aggravating circumstance. Again Esparza takes words out of context in order to attempt to create a viable issue. These words were taken from a discussion by the court primarily instructing the jurors to weigh the quality of the aggravating and mitigating factors rather than the quantity. The trial court stated:

> It is the quality of the evidence that must be given primary consideration by you. The quality of the evidence may or may not correspond with the quantity of the evidence, that is, the number or Witnesses or Exhibits presented in this case. It is not only the quantity of aggravating circumstance versus the quantity of mitigating factors which is the basis of your decision. The quality or importance of the mitigating factors and of the aggravating circumstance must also be considered.

Tr. T. V. p. 213. The trial judge was very careful during this admonition to always put the words "aggravating circumstance" in the singular. In fact, this discussion makes it clear that the jury was weighing one aggravating circumstance against more than one mitigating factor. Accordingly, this Court finds this claim to be without merit.

vi. Lingering Doubt Instruction

Next are two instructions that Esparza contends should have been given to the jury, but were not. First, Esparza asserts the jury should have been instructed that lingering doubt is a factor which can be considered in sentencing.[66] The Court finds this claim to be without merit. The trial court clearly instructed the jury that mitigating factors include any circumstance relevant to whether a death sentence was appropriate: "those mitigating factors include, but are not limited to, the nature and circumstance of the offense, the history, character and background of the offender, and . . . any other factors which are relevant to the issue of whether the offender should be sentenced to death." Tr. T. V. at p. 212-213. The trial court's failure to specifically enumerate the factor of residual doubt does not create a concern of constitutional implications. "[T]he Constitution does not require a State to adopt specific standards for instructing the jury in its consideration of aggravating and mitigating circumstances." *Zant v. Stephens*, 462 U.S. 862, 890 (1983). As long as the jury instructions regarding aggravating and mitigating circumstances leave "no reasonable possibility that the jury misunderstands its role in the capital sentencing procedure or misunderstands the

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[66] A "residual doubt" theory involves presentation of "further evidence in an attempt to instill in the jury a reasonable doubt of guilt, with the apparent aim of persuading the jury that the death penalty should not be imposed where some doubt as to guilt remained." *State v. Apanovitch*, 514 N.E.2d 394, 402 (Ohio 1987). The Supreme Court defined residual doubt as "a lingering uncertainty about facts, a state of mind that exists somewhere between 'beyond a reasonable doubt' and 'absolute certainty.'" *Franklin v. Lynaugh*, 487 U.S. 164, 188 (1988).

meaning and function of mitigating circumstances," no constitutional error is present. *Peek v. Kemp*. 784 F.2d 1479, 1494 (11th Cir. 1986), *cert. denied*, 479 U.S. 939 (1986).

The Supreme Court recently affirmed these principles in *Buchanon v. Angelone*, 522 U.S. 269 (1988), when it was "call[ed] on. . . to decide whether the Eighth Amendment requires that a capital jury be instructed on the concept of mitigating evidence generally, or on particular statutory mitigating factors." *Id*. at 270. In *Buchanon*, the trial court's instructions to the sentencing jury regarding the meaning and identity of mitigating factors were less precise than the instructions Esparza's sentencing jury received. *See id*. at 272 n.1 (quoting jury instructions). The defendant contended that these instructions "failed to provide the jury with express guidance on the concept of mitigation, and to instruct the jury on particular statutorily defined mitigating factors," *id*. at 276, and that "the Eighth Amendment. . . requires the court to instruct the jury on its obligation and authority to consider mitigating evidence, and on particular mitigating factors deemed relevant by the State." *Id*. at 275.

A majority of the Supreme Court, however, disagreed, noting that Court had "never. . . held that the state must affirmatively structure in a particular way the manner in which juries consider mitigating evidence." *Id*. The *Buchanon* Court stated:

> By directing the jury to base its decision on "all the evidence," the instruction afforded the jurors an opportunity to consider mitigating evidence. The instruction informed the jurors that if they found the aggravating factor proved beyond a reasonable doubt then they "may fix" the penalty at death, but directed that if they believed that all the evidence justified a lesser

> sentence that they "shall" impose a life sentence. The jury was thus allowed to impose a life sentence even if it found the aggravating factor proved.

Id. at 277. The Court concluded that "[t]he absence of an instruction on the concept of mitigation and of instructions on particular statutorily defined mitigating factors did not violate the Eighth and Fourteenth Amendments to the United States Constitution." *Id.* at 279.

Even more than the trial court in *Buchanon*, Esparza's trial judge instructed the jury regarding the concept of mitigation, gave examples of mitigating factors, and explained how to weigh mitigating factors in its death penalty deliberations. These mitigating instructions clearly meet constitutional requirements, as established by *Buchanon*. Indeed, the jury instructions to which Esparza objects would apparently receive the approval of even the dissenters in *Buchanon*. Because the challenged instruction clearly explains to the jury its role in the penalty phase of the trial and how to identify and weigh mitigating circumstances, this claim fails.

vii. Mercy Instruction

The second instruction that Esparza contends should have been given to the jury, but was not, is that the jury could exercise mercy even if the aggravating circumstances outweight the mitigating factors. The Sixth Circuit addressed this issue in *Mapes v. Coyle*, 171 F.3d 408 (6th Cir. 1999) and concluded it would be error if the court had given this instruction. The Sixth Circuit stated that, an instruction that the jury may "disregard the statutory criteria for imposing a death sentence may be constitutionally impermissible in light of the probability that such an instruction would result in

arbitrary and unpredictable results." *Id.* at 415 (citations omitted). "[S]entencers may not be given unbridled discretion in determining the fates of those charged with capital offense." *Id.* (*citing California v. Brown*, 479 U.S. 538, 541 (1987)). Therefore, the Court found that "there is no merit whatsoever to [petitioner's] claimed entitlement to a 'merciful discretion' instruction, in light of the likely tendency of such an instruction to lead to arbitrary differences in whom is selected to be sentenced to death." *Id.* Accordingly, this Court finds no merit to Esparza's claim for a jury instruction that gives the jury "merciful discretion" on whether or not to sentence Esparza to death.

Because none of these claims were found to have merit, it was not ineffective assistance for appellate counsel to forgo raising them. On the contrary, appellate counsel was using the time and resources of the court much more effectively by ignoring these meritless claims.

9. Esparza's Forth-Sixth Claim for Relief

Esparza's forty-sixth claim is that the trial court and the prosecutor impermissibly shifted the burden of persuasion to the petitioner during the sentencing phase.

Esparza asserts several instances where the trial court allegedly instructed the jury that the burden of proof was on the defendant. In all of these instances the trial court stated quite clearly that the burden of proof was on the state. The Court has addressed all of these instances in Esparza's previous claim of improper jury instructions and has not found an improper placement of the burden of proof in the record of the proceedings.

Esparza also alleges that the prosecutor made several statements that could be interpreted as placing the burden of

proof on Esparza during the sentencing phase. The Court has already found these claims to be without merit in its discussion of alleged prosecutorial misconduct. Accordingly, the Court finds Esparza's forth-sixth claim to be without merit.

10. Esparza's Fiftieth Claim for Relief

Esparza's fiftieth claim is that the trial court's reliance on non-statutory aggravating circumstances, misconceptions of law, and its failure to recognize mitigating evidence and factors violated Esparza's constitutional rights. The Court has addressed these issues separately in earlier claims and found them to be without merit. Combining these claims into one claim does not change the Court's previous findings. Accordingly, the Court finds Esparza's fiftieth claim to be without merit.

11. Esparza's Forty-Fourth, Thirty-Ninth, and Fifty-Second Claim for Relief

The Court now addresses several other claims in Esparza's petition which the Court finds well-taken. Because these claims are based on similar facts and events, the analysis the Court must take in examining these claims is intertwined; the Court, thus, addresses these claims together.

Esparza's forty-fourth claim is that his counsel provided him with ineffective assistance during the mitigation phase of trial. Esparza's thirty-ninth claim is that the trial judge impermissibly denied Esparza a continuance to allow his counsel to prepare for the mitigation phase of the trial and to allow adequate time for preparation of a pre-sentence investigation report. Esparza's fifty-second claim asks that the Court find that the cumulative error that occurred during the mitigation phase militates in favor of

granting Esparza's habeas petition. The Court, as discussed below, finds Esparza's counsel to have been grossly unprepared for the mitigation phase of the trial. The Court also finds that it was an abuse of discretion for the trial judge, who knew that Esparza's counsel was unprepared, and could not have had time to prepare for the mitigation phase of trial, to refuse to grant Esparza a continuance to prepare for this aspect of the proceedings. Finally, the Court finds that, while both of these errors provide individual grounds for habeas relief, these errors, in combination with each other and with other problems that infected the sentencing phase of this proceeding, together constitute cumulative error.

a. Ineffective Assistance of Counsel during Mitigation Phase

Esparza's forty-fourth claim is that the ineffective assistance of his counsel during the sentencing phase deprived him of his constitutional rights. Esparza alleges that his trial counsel was deficient in at least the following ways: (1) counsel did not prepare for the sentencing phase of trial; (2) counsel did not thoroughly investigate and present evidence which would have given the sentencing jury a complete explanation of Esparza's developmental history and the manner in which his history contributed to his commission of the offense; (3) counsel did not interview or present as witnesses many family members, close friends and associates who had first hand knowledge of Esparza's traumatic and chaotic childhood, and his loss and dislocation in life as an adult; (4) the few witnesses Esparza's trial counsel did present could have offered more mitigating factors in their testimony if counsel had properly investigated the nature of their relationship with Esparza and their familiarity with his history; (5) counsel did not collect any records in order to document Esparza's personal

development, nor did he provide any records to the psychologist who evaluated Esparza; (6) counsel requested that the probation department prepare a pre-sentence investigation and psychological report, without investigating what sort of information would be included in those reports, without understanding that the reports would be put before the jury, and with knowledge that the report would be prepared in approximately twenty-four (24) hours; (7) counsel did not object to and, in fact, jointly offered much evidence through the pre-sentence investigation and psychological reports that was extremely damaging to Esparza; (8) counsel did not argue residual doubt as a mitigating factor; (9) counsel did not offer Esparza as a witness in the sentencing phase, where Esparza could have made an unsworn statement, not subject to cross-examination; and, (10) counsel failed to object to numerous errors and improprieties in the state's presentation and argument during the sentencing phase.

Respondent does not assert that this claim is either unexhausted or subject to procedural default. Indeed, respondent quotes from the Ohio appellate court decision where the claims presented here were squarely addressed on the merits. On direct appeal, the state courts found that Esparza had not been denied effective assistance of counsel at either stage of the proceedings. *See State v. Esparza*, No. L-84-225, 1986 WL 9101 at *22 (Ohio App. Aug. 22, 1986); *State v. Esparza*, 529 N.E.2d 192, 198 (Ohio 1988). during post-conviction proceedings, moreover, the state courts again rejected this claim on the merits, concluding that it was proper to decide the issue without an evidentiary hearing because they believed the claim could be determined by reference to the trial court record. *State v. Esparza*, 1992 WL 113827 at *6 (Ohio App. May 29, 1992) ("Upon a thorough and careful review of the penalty proceedings in petitioner's capital trial, we conclude that trial counsel's failure to

interview or call all potential witnesses did not amount to ineffective assistance of counsel. Moreover, because the issue of ineffective assistance of counsel during the penalty phase of a capital trial can be determined upon a review of the record, the trial court did not err in dismissing the fiftieth cause of action without a hearing").[67] This Court will accordingly, proceed to address the issue on the merits.

As stated above, under *Strickland v. Washington*, 466 U.S. 668 (1984), counsel's conduct will only be deemed constitutionally deficient if both of the following are true: (1) counsel's conduct fell below basic standards of assistance, and (2) that, but for counsel's professional failures, the result of the trial would likely have been different – *i.e.*, the defendant was prejudiced thereby. Therefore, the petitioner must demonstrate both cause and prejudice to prevail on an ineffective assistance of counsel claim. To demonstrate cause, the petitioner must show "that counsel's representation fell below an objective standard of reasonableness."

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[67] This Court, after conducting its own hearing, finds, moreover, that the sentencing phase ineffective assistance of counsel claim is largely based on evidence *dehors* the record. "Ohio imposes a procedural bar only as to those ineffective assistance of trial counsel claims which rest on facts of record that could have been determined on direct appeal." *See Beuke v. Collins*, No C-1-92-507, 1995 U.S. Dist. LEXIS 22095, *100 (S.D. Ohio Oct. 19, 1995). Therefore, Ohio has constructed no procedural bar to the consideration of this claim of ineffective assistance of counsel, to the extent the evidence supporting it is based on what the trial counsel did *not* do, not what the trial counsel did ineffectively. This is evidence *dehors* the record. Esparza clearly raised this claim in post-conviction proceedings, which is all that the Ohio Courts require in order for Esparza to escape procedural default in such circumstances.

Strickland, 466 U.S. at 687-88. "The objective standard of reasonableness is 'highly deferential' and includes a 'strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." *Skaggs v. Parker*, 27 F. Supp.2d 952, 967 (1988) (*citing Strickland*, 466 U.S. at 688-89). Under this standard, "[t]he assistance required of counsel is not that of the most astute counsel, but rather that of 'reasonably effective assistance.'" *Id.*

To establish prejudice, the petitioner must show that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 694. "A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Id.* To satisfy this showing, the petitioner must show that his counsel's blunders "so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result." *Id.* at 686.

State court findings that an attorney's action was based on a tactical decision are entitled to a presumption of correctness. *Evans v. Thompson*, 881 F.2d 117 (4th Cir. 1989), *cert denied*, 497 U.S. 1010 (1990). Here, the state appellate court was faced with the issue of ineffective assistance of counsel during the mitigation proceedings on two separate post-conviction appeals. The court both times found that Esparza had not been denied the effective assistance of counsel during this phase of the proceedings. *State v. Esparza* 1992 WL 113827 at *6 (Ohio App. May 29, 1992) ("Upon a thorough and careful review of the penalty proceedings in petitioner's capital trial, we conclude that trial counsel's failure to interview or call all potential witnesses did not amount to ineffective assistance of trial); *State v. Esparza*, 1994 WL 395114 at *7 (Ohio App. July 27, 1994) ("upon a complete review of the mitigation hearing and

evidence we concluded that trial counsel reasonably investigated and prepared for the sentencing phase of the trial and provided appellant effective assistance of counsel at this stage.")

The state courts, however, during the post-conviction appeals did not grant a hearing to determine Esparza's claim for ineffective assistance of counsel because they found that the evidence of ineffective assistance, if any, was in the record of the proceeding. *State v. Esparza*, 1992 WL 113827 at *6. ("[T]he issue of ineffective assistance of counsel during the penalty phase can be determined upon a review of the record, and without resort to evidence *dehors* the record, the trial court did not err in dismissing the fiftieth cause of action without a hearing"). This Court, after conducting an independent hearing on this issue, determines that the Ohio appellate courts, though due the utmost deference, not only made an incorrect decision, but made an *unreasonable* decision in concluding that Esparza was given the effective assistance of counsel. This Court finds that the Ohio appellate court decisions were an unreasonable application of Supreme Court precedent. *See Williams v. Taylor*, -- U.S. --, 146 L.Ed.2d 389 (2000).

During the evidentiary hearing held by this Court on August 17, 1999, attorney Keithly Sparrow testified about his representation of Esparza during the sentencing phase of the proceeding. Sparrow testified that he had not begun preparation for the mitigation phase of the trial until Esparza was found guilty, late in the day on Thursday May 10, 1984.[68]

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[68] During the evidentiary hearing Sparrow bluntly stated that he had not prepared for the mitigation phase until after Esparza was found guilty.

The sentencing phase of the trial began on Monday, May 14, 1984. He, accordingly, had only a few days, over a weekend, to prepare for the mitigation phase. He requested an independent psychologist to help the defense with the mitigation proceedings, but did not explain to the trial court why psychological aid was necessary in order to present

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> Q: As of that date and hour that jury came back with a guilty verdict, had you interviewed any witnesses with a view toward possible sentencing hearing?
>
> Sparrow: I don't recall specifically.
>
> Q: Had you obtained any physical or documentary evidence to review for a potential sentencing hearing?
>
> Sparrow: Probably not. I can't recall specifically but probably not.

. . .

> Q: Is it correct to say that your preparation for the sentencing hearing began on the 11th of May, 1984.
>
> Sparrow: That's probably correct, that's accurate.

Later on Sparrow restated that he not begun [*sic*] preparations for the mitigation phase until after the guilty verdict.

> The Court: You said that you didn't begin preparations for the sentencing or mitigation phase of the proceeding until after the verdict in the case?
>
> Sparrow: It's my recollection, Your Honor, as best I can recall.

potential mitigating factors. The judge, thus, denied this motion.

In the evidentiary hearing held before this Court on August 18, 1999, it was established that Esparza suffers from damage to the frontal lobes of his brain (caused by a traumatic head injury as a child) and that this injury interferes with his ability to properly understand the consequences of his actions before he acts, to plan ahead or to inhibit impulsive behaviors.[69] Esparza's intelligence level is also on

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[69] The expert witness, Dr. Michael Gelbort, testified about Esparza's organic brain disorder:

> The tests that he took showed difficulty, dysfunction, deficits or damage in the frontal lobes. . . deficits in the form of learning and frontal lobes were showing fairly consistent impairment, and impairment was arising in terms of impulse control, the ability to appropriately inhibit or stop thoughts, words, behaviors, things like that.
>
> . . .
>
> The frontal lobes are responsible for integrating our behavior, for organizing our behavior, for helping us think the big thoughts rather than the basic thoughts. . . they're the part of the brain that help us think the big thoughts that plan, to anticipate, to consider consequences. They're also very involved in us starting behavior or initiating, and inhibiting or stopping behavior that we don't want to display or show. so the people after brain injury sometimes have initiation problems and they become the proverbial couch potato, they sit and don't do anything. More likely is that they become disinhibited and they act before they think. They speak before they think. Those are frontal lobe deficits as well.

the borderline of mental retardation. If Mr. Sparrow had investigated Esparza's prior records, he would have discovered this information and been in a position to support

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. . .

Mr. Esparza showed on testing and shows historically some difficulties with anticipating consequences of his own behavior. With planning and adapting in a meaningful way. He's not so impaired as to be unable to get through a day by day existence but he has not done so from what I can see in his history in as effective a manner as a normal individual.

The testing shows reasoning problems, problems with judgment, especially showed problems in figuring out what's important in a situation. In other words, if you present five different ideas and ask him to figure out how to proceed, whereas most people will figure out which is the most important idea and what the limiting factor is or what to proceed upon, he is kind of—it's kind of hit or miss for him. And what else is interesting that show up clearly in the testing is that you give him the same type of problem five different types and he'll happen on five different solutions or three different solutions, whereas most people happen on the same solution over and over again. They'd see it, size it up the same way, and proceed the same way.

And with him because of the fact the frontal lobes are not functioning correctly, he cannot make that happen. He may want it to happen. He may be motivated to figure things out and to plan ahead, but his brain does not support normal reasoning problem solving. It's like a runner who wants to run a race but has a leg that's an inch shorter. Try as they might they're working with a handicap or an impediment and their physiology and their actual physical function does not support normal abilities, normal functioning.

his request for an independent psychologist.[70] He also would have been in a position to share these facts about Esparza with the jury.

After being denied an opportunity to pursue issues regarding Esparza with an independent psychologist, Mr. Sparrow requested a pre-sentence investigation and psychological report. He did so, however, without doing any independent investigation of Esparza's history and home life, and without understanding that anything included in that report likely would be admitted into evidence.[71] Mr. Sparrow

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[70] Had the trial court been presented with the substantial evidence of a brain disorder that was provided to this Court, it might well be appropriate to conclude that the denial of Esparza's request for appointment of a psychologist was error. In the absence of such a record, however, this ruling is only problematic if it supports petitioner's ineffectiveness of counsel claims.

[71] Q: . . .Did you have any notion of what would be contained in the mental status examination report to the Court?

Sparrow: No.

Q: Did you have any notion what would be contained in the presentence report?

Sparrow: No.

. . .

Q: In your judgment at the time, was this presentence report harmful to Mr. Esparza?

Sparrow: Extremely so.

Q: Contained, for example, his prior criminal history?

Sparrow: Right.

Q: Would that have been admissible but for your request to have a presentence report prepared?

Sparrow: He didn't testify

. . .

Q: In any event, the fruit of your request, which was this pre-sentence report, caused you and your co-counsel to do whatever you could to get it back off the table?

Sparrow: Right

Q: And have it withdrawn?

Sparrow: Right?

Q: And that request was denied by the trial court?

Sparrow: Right

. . .

The Court: Did you know at the time that you asked for a PSI that no matter what was in it, it would all be presented to the jury?

Sparrow: I don't think we did, you know, but again, part of our problem with the PSI is that we had to eat what they put on the table, and it wasn't palatable, and we had no way to get rid of it, and I'm convinced in hindsight that was an error to order it.

The Court: When you asked for the PSI, whether or not you realized that everything would have to go to the jury,

did not collect any information, or give any information to the agency that created these reports.[72] These reports, which

did you have any idea how bad the information would be when you got it back.

Sparrow: No, and again, because my recollection was that the writer was coming to her own conclusions about how certain evidence fit certain of the factors, so I guess we may well have thought, well, we'll get a neutral report of some sort, just a social history and all that without having the writer go into, this is an aggravating factor, this is a mitigating factor, this is that, this is the other.

So that's what I mean when I say we had to eat what was there.

The Court: So you didn't anticipate that consideration of all potential mitigating factors under the Ohio law?

Sparrow: No.

[72] Sparrow candidly admitted this during the evidentiary hearing:

Q: Did you -- the attorneys representing Mr. Esparza furnish any data, materials, information to the Court diagnostic and treatment center?

Sparrow: No.

Q: Did you orally even, a phone call to pass along any information?

Sparrow: No.

were created in only one day, were furnished to the court during a hearing on Saturday, May 12, 1984.[73] Mr. Sparrow

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[73] Bob Dixon, an attorney with considerable expertise in death penalty cases, testified during the evidentiary hearing that Esparza's counsel's decision to request the pre-sentence investigation and psychological reports was ineffective assistance of counsel, at the time when Esparza's counsel made that decision.

Q: Do you have an opinion on whether that [requesting a pre-sentence investigation and psychological report] is an acceptable practice or not?

Dixon: I think it would be completely unacceptable practice to have a client referred to the probation department for preparation of a pre-sentence report.

Q: Why is that?

Dixon: Lack of confidentiality. I also believe that in my experience that most of the Court psychiatric clinics are not familiar with just the statutes themselves governing mitigation. They're certainly not familiar with what I would say favorable case law to the defense, expanding the scope of those statutes; and on the other side, limiting the scope of the aggravating circumstances. And I don't think that most people in the Court psychiatric clinics or rather probation departments have the expertise to develop that kind of report. I think developing that kind of report also requires the participation and input of the attorney, and working with a person that would gather the information, because the attorney knows the legal parameters, if you will, whereas the social worker who is trained at gathering information and putting together social histories and spotting problem areas or favorable areas, they may not be as familiar with the legal side of it.

also made no effort to locate and interview mitigation phase witnesses until after the guilty verdict.[74] While Mr. Sparrow

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So of course, if you choose the Court clinic, you don't have that opportunity to form that kind of working relationship, and then also again, you lose the confidentiality, the report goes to the Court and it. . . also goes to the jury per statute.

. . .

Q: In terms of the general opinion you expressed that such reports should not be ordered, was that the state of or was that the general opinion of competent capital defense counsel in the early 1980s?

Dixon: Yes.

. . .

Absolutely. That was specifically discussed as something that we not do under any circumstances.

[74] Q: From your appointment on March 8, 1984, until the commencement of trial on April 30th, can you describe for us what you did to prepare for the potential sentencing phase of his trial?

Sparrow: I don't have a specific recollection. Probably not a lot but I can't remember now.

Q: Do you recall whether you or co-counsel prepared and presented to Greg Esparza releases to obtain medical records, psychological records, juvenile records, probation records?

Sparrow: I don't recall doing that

did call a few witnesses in the sentencing phase, Esparza's grandfather, aunt, brother and foster-parent, he did not interview them beforehand to determine what they might offer the jury by way of insight into Esparza.[75] Mr. Sparrow

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. . .

Q: Do you recall that you or co-counsel or your investigator sat down with Mr. Esparza to obtain a family and personal history from him?

Sparrow: Not in that manner, no.

Q: Can you tell the Court today when it was you learned that. . . Mr. Esparza had foster parents?

Sparrow: No I don't recall. Toward the end if not after the verdict.

[75] Esparza lists in his traverse information that was not presented to the trier of fact because his counsel made little effort to seek out this sort of information. Although some of these facts, presented singularly, would have little effect on a juror's determination of mitigating factors, the cumulative effect of these facts surely could have resulted in a different outcome in the mitigation stage of the analysis.

1) There were rats and cockroaches in the household in which the Esparza children were raised. Exhibit B, D.

2) There was never any food in the house for the Esparza children. Exhibit I.

3) Frank Esparza, petitioner's father, drank excessively. He would often be absent from the household

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for days. When he would drink he became violent. Exhibit B, F, G, H, I, J.

4) Frank Esparza would frequently beat his wife and children and would use a broom or belt. Exhibit E, F, P.

5) Petitioner received the worst treatment of the Esparza children. Exhibit O.

6) Petitioner's brother, Peter Esparza, was treated much better than Gregory Esparza. Exhibit A.

7) At the age of four or five years, Greg was struck by an automobile and rendered unconscious. He suffered a traumatic head injury as a result of this accident. Exhibit H.

8) Frank Esparza would frequently be involved in fights outside the household. Exhibit H, O.

9) Beatrice, petitioner's mother, verbally abused her children, as she would take out her frustrations.

10) Beatrice would not attempt to defend the children when they were being beaten by her husband. Exhibit E, O.

11) After Frank left his family for the last time, Beatrice began to drink heavily. She did not care about her children. Exhibit F, H.

12) Beatrice Esparza would also often absent herself from the home for periods of days. Exhibit B, O.

13) The Esparza children, prior to being placed in foster homes were raised by their ten-year old sister Ruth. Exhibit B.

14) The Esparza children were removed from their home at an early age in a paddy wagon and placed in an orphanage. Exhibit A.

15) Greg was the last of the Esparza children who left the orphanage or Children's Home. Exhibit L, O.

16) Grandmother Carmen Dela Rosa, who assisted in raising Greg, hated Petitioner and referred to the Petitioner as the "devil." Exhibit A.

17) Grandfather Richard Dela Rosa hated Greg because Greg was like his father. Exhibit C.

18) Greg's grandparents did not have the resources or parenting ability to raise the Esparza children. Exhibit M, P.

20) One of the times Gregory Esparza left the Children's Home he resided with his father. His father's girlfriend physically abused Petitioner. Exhibit C.

21) During the same time period Petitioner's father would beat Greg in the area of his genitals. Exhibit J.

22) Petitioner's mother died while he was in the orphanage. Greg Esparza was particularly affected over the death of his mother. Exhibit D.

23) Greg was physically abused by the principal at one of his schools while he was in a foster home. Exhibit K

24) Gregory Esparza helped to raise his brother Ray Esparza, when Ray had no place else to live. Exhibit C.

also did not call Esparza to present an unsworn statement or apology to the jury during the mitigation hearing, even though Esparza would not have been subject to cross-

25) Greg's brothers and sisters never wanted to be with Greg as he grew older. Exhibit L.

26) Petitioner was always trying to seek the approval of the other family members. Exhibit A.

27) Greg was a follower who could easily be talked into committing inappropriate acts. Exhibit H.

28) Most of the males in the Esparza family are heavy drinkers. Exhibit N.

See Traverse at pages 92-94.

examination for that statement.[76] Nor did Mr. Sparrow present evidence of Esparza's remorse for the crime.[77]

The Supreme Court has recently granted habeas on facts the Court perceives as less extreme than those existing here. *See Williams v. Taylor*, -- U.S. --, 146 L. Ed. 2d 389 (2000). In *Williams*, the Supreme Court found that trial counsel's representation of the petitioner during the sentencing phase fell short of professional standards when:

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[76] Robert Dixon testified at the evidentiary hearing that presenting a defendants unsworn statement during the mitigation phase is almost always good practice.

Q: You stated that at a minimum in your affidavit, and I believe you testified to this, that the defendant should give an unsworn apology during mitigation.

Dixon: Yes.

Q: Would this apply in every case?

Dixon: I think in almost every case I've handled I would want my client to do that if he's able to do so.

[77] During the guilt phase of the trial, Albert Richardson, the jailhouse informant, testified that Esparza did not mean to hit Gerschultz when he fired the shot, that it was meant to be a warning, and that Esparza called the convenience store that night to check on the well-being of the victim. Tr. T. V. III at p. 1452. Mr. Sparrow did not present this information, or any other evidence of remorse, during the mitigation phase. Indeed, he did not even refer back to this important fact in his presentation to the jury.

> The record establishes that counsel did not begin to prepare for that phase of the proceeding until a week before trial. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood. . . . Had they done so, the jury would have learned that Williams' parents had been imprisoned for criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social service bureau for two years during his parent's incarceration. . .

Williams, 146 L. Ed. 2d at 419. Williams' counsel also failed to introduce available evidence that Williams was borderline mentally retarded and did not advance beyond the sixth grade in school. In Esparza's case, Esparza's counsel had only one weekend to prepare for the mitigation phase of the trial, far less than the week found inadequate in *Williams*. Esparza's counsel also failed to investigate and present similar mitigating evidence on Esparza's part, evidence of an extremely traumatic and abusive childhood, and evidence of Esparza's brain injury and resulting mental deficiencies.

In *Williams* the Supreme Court also pointed out that Williams' counsel spent much of his closing argument undermining the mitigating factors by emphasizing that it was hard to find a reason to grant *Williams* mercy. *See id.* at 403, n. 2. Esparza's counsel's uninformed decision to request a pre-sentence and psychological report resulted in an unintended emphasis, but an emphasis nonetheless, on the psychologist's view that Esparza lacked mitigating factors. Thus, Esparza's counsel, like the counsel in *Williams*, not only failed to present much evidence that was mitigating to

Esparza, but caused evidence to be presented that was wholly counter to his role as a defense attorney charged with presenting mitigating factors.

The Sixth Circuit has also addressed the issue of ineffective assistance of counsel during the mitigation phase, and has granted a partial writ of habeas corpus on similar facts in several recent cases. In *Carter v. Bell*, 218 F.3d 581 (6th Cir. 2000), the Sixth Circuit found that petitioner's counsel was ineffective because they failed to present evidence "including assertions of illegitimacy, extreme childhood poverty and neglect, family violence and instability during childhood, poor education, mental disability and disorder, military history, and positive relationships with step-children, adult family and friends." *Id.* at 592-593.

In *Rickman v. Bell*, 131 F.3d. 1150, 1157 (6th Cir. 1997), the Sixth Circuit noted that trial counsel "did not interview any witnesses, conduct any research, or obtain and review any records, including those regarding [petitioner's] employment, education, mental health, social services contact, military service, or prison experience." In that case, trial counsel's preparation "consisted solely of interviews he conducted with [petitioner]." *Id.*[78]

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[78] Although in *Rickman* there was the additional factor that petitioner's trial counsel's position was hostile to petitioner, this case still "stands for the relevant proposition that the complete failure to investigate, let alone present, existing mitigating evidence is below an objective standard of reasonable representation, and may in fact be so severe as to permit us to infer prejudice." *See Carter v. Bell*, 218 F.3d 581, 595 (6th Cir. 2000)

In *Groseclose v. Bell*, 130 F.3d 1161 (6th Cir. 1997), trial counsel "almost entirely failed to investigate the case; he never, for example, interviewed the crime-incidence witnesses or any family members." *Id.* at 1166. In that case, the Sixth Circuit found that petitioner's counsel was ineffective during both the trial and mitigation phase. During mitigation, trial counsel failed to show that the petitioner had no criminal history, was active in church, had a positive military record, and "a plethora of family members to testify on this behalf." *Id.* at 1171. Failure to prepare for the mitigation phase of the trial, coupled with the failure to put before the jury these mitigating factors was enough to show ineffective assistance of counsel.

In *Austin v. Bell*, 126 F.3d 843, 848 (6th Cir. 1997), the Sixth Circuit held that trial counsel's failure "to investigate and present any mitigating evidence during the sentencing phase so undermined the adversarial process that [petitioner's] death sentence was not reliable." *Id.* In that case, petitioner's attorney did not present any mitigating evidence "because he did not think that it would do any good." *Id.* The Court found this was ineffective assistance because "given that several of Austin's relatives, friends, death penalty experts, and a minister were available and willing to testify on his behalf, this reasoning does not reflect a strategic decision, but rather an abdication of advocacy." *Id.* at 849.

The Sixth Circuit granted a partial writ of habeas corpus on almost identical facts in *Glenn v. Tate*, 71 F.3d 1204 (6th Cir. 1995). In *Glenn*, the lawyers representing the defendant similarly "made virtually no attempt to prepare for the sentencing phase of the trial until after the jury returned its verdict of guilty." *Glenn*, 71 F.3d at 1207. The Sixth Circuit found that "[t]his inaction was objectively unreasonable. To save the difficult and time-consuming task

of assembling mitigation witnesses until after the jury's verdict in the guilt phase almost insures that witnesses will not be available." *Id.* (citations omitted). The Sixth Circuit listed a number of areas where the lawyers involved in that case lacked reasonable preparation.

> The lawyer's made no systematic effort to acquaint themselves with their client's social history. They never spoke to any of his numerous brothers and sisters. They never examined his school records. They never examined his medical records . . . or records of mental health counseling they knew he had received. They never talked to his probation officer or examined the probation officer's records. And although they arranged for tests, some months before the start of the trial, to determine whether he was competent to stand trial, they waited until after he had been found guilty to take their first step – or misstep... toward arranging for expert witnesses who might have presented mitigating evidence on John Glenn's impaired brain function.

Glenn, 71 F.3d at 1208. This same list, as well as the list set forth above in *Williams* and *Carter*, could easily describe the lawyers who represented Esparza during his sentencing phase. Similarly, Esparza's lawyers did not begin preparation for the sentencing phase until after trial. They did not collect records of Esparza's social and medical history. They did not present mitigating factors that could have and should have been presented because they had made little effort to discover what those mitigating factors were. Also, much like in *Glenn*, they made the same mistake of asking for a pre-sentence investigation report without

understanding the enormous risks and pitfalls inherent in that request.

The lawyers in *Glenn* also requested a pre-sentence investigation report without understanding that anything contained in that report would be admitted into evidence. These same lawyers did not offer any information or investigatory materials to the psychologists and other professionals responsible for creating these reports. When the lawyers in *Glenn* realized the magnitude of their error, they similarly asked the trial court to keep out portions of the report. The trial court refused in that case as well. The Sixth Circuit explained this error:

> Defense counsel asked the trial court to redact this sentence before sending the report to the jury, but the court refused to do so. This was probably an error on the court's part in our view. The problem would never have arisen, however, if defense counsel had not settled for court-appointed experts whose reports were going to be given to the jury willy-nilly, rather than exercising the right to obtain defense experts under O.R.C. § 2929.024, the statute initially cited by counsel.

Glenn, 71 F.3d at 1210. Esparza's attorney made the same mistake in asking for court-appointed experts whose reports and conclusions would come into evidence without regard for how they may affect the defendant – whether that evidence was mitigating or damaging. Esparza's attorney similarly asked to take back his request for the pre-sentence investigation once he realized that everything in the report would be entered into evidence and once he recognized how shoddily it had been thrown together. By that time, again, it was too late. Because of these omissions, mistakes and

general lack of crucial knowledge, this Court finds that Esparza's attorneys were ineffective during the mitigation phase of the proceedings.

The next inquiry, then, is whether this ineffectiveness prejudiced Esparza. "To establish prejudice [Esparza] must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Williams v. Taylor*, -- U.S. --, 146 L. Ed. 2d 389, 416 (2000). Therefore, the question is "whether counsel's conduct so undermined the proper functioning of the adversarial system that the trial [a term that includes capital sentencing proceedings] cannot be relied on as having produced a just result." *Glenn*, 71 F.3d at 1210-1211 (*citing Strickland*, 466 U.S. at 686).

The proceedings here cannot be relied upon to have produced a just result. Defense counsel only called four witnesses who personally knew Gregory Esparza: his grandfather, his aunt, his brother and his foster-parent. A cursory and ill-prepared direct examination was performed on each of them. This examination elicited very little mitigating evidence. If defense counsel had been prepared, much more could have been offered through each of these witnesses and through other witnesses who were not called. For instance, further testimony about the abusive and harsh environment in which Esparza was raised could have been proffered. The jury could have been presented with more evidence of the physical abuse that Esparza suffered from the hands of both his father and, later, his father's girlfriends, and the emotional and verbal abuse he sustained from his mother and grandparents. Also, the jury could have learned more about Esparza's extended periods in orphanages and his poor relationship with his own siblings. The jury would have

learned about Esparza's traumatic head injury as a child and resulting brain damage. And, the jury also could have learned of Esparza's personality as a follower who easily could be talked into inappropriate acts.[79] Finally, the jury

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[79] In *Scott*, this Court refused to set aside a death penalty on ineffective assistance of counsel grounds, despite the fact that *no* mitigation evidence was presented at the sentencing phase. *See Scott v. Anderson*, 58 F.Supp. 2d 767, 813 (N.D. Ohio 1998). That decision was then upheld by the Sixth Circuit. *See Scott*, 209 F.3d at 879. Unlike in *Scott*, however, counsel's failure to present mitigating evidence here cannot be characterized as a tactical decision made to keep prior criminal acts out of the sentencing proceeding and, thus, avoid damage to counsel's pursuit of a residual doubt theory. *Id.* In *Scott*, petitioner's counsel decided not to call petitioner's family to testify during the sentencing proceeding because he was worried that the prosecutor would have elicited information concerning his background, including "robbery assault, kidnaping, and other violent acts upon innocent citizens" which would have undercut his continued claims of innocence. *Id.* There, it was not a question of a failure to prepare, but a circumstance where, even with preparation, the risks of presenting mitigating evidence (of which there was a paucity) outweighed the benefits. *See, e.g., Abdur'Raman v. Bell*, 2000 WL 1285481 at *12 (6th Cir. Sept. 13, 2000) (finding that counsel's failure to present defendants background as mitigating evidence was not ineffective assistance of counsel because defendants violent background could also be viewed as aggravating circumstances). Here, counsel did call some of Esparza's family, and did not ever state, nor does it appear that he would have had cause to state, he was concerned that prosecutors would attempt to divulge Esparza's criminal history through them. *See Williams v. Taylor*, -- U.S. --, 146 L. Ed. 2d 389, 420 (2000) (finding that counsel's failure to

could have heard from Esparza himself regarding his intoxication on the night of the murder and his remorse for having fired the fatal shot.

There was also much evidence that came in during the sentencing phase that a reasonably prepared attorney would not have allowed, or at least would have sought to exclude. This evidence came in through the pre-sentence investigation and psychological report that Esparza's counsel requested while still ignorant of the consequences of that request. The evidence that came in through these reports was devastating. One of the psychologists, Charlene Cassel, as part of the report, systematically went through each mitigating factor and explained why she believed it did not apply or exist in this case. She also testified (with what appears to be an absence of any real basis for doing so) that Esparza had an anti-social personality disorder that could not be treated successfully, and that there was a high degree of probability that Esparza would commit future criminal acts. The other psychologist William Seman, testified that Esparza's denial that he was involved with the murder was consistent with his anti-social personality disorder, and, in his experience, it was "not unusual for people to deny their culpability in an offense." Tr. T. V. p. 121. These conclusions were reached, moreover, without the benefit of any medical evidence regarding Esparza's earlier traumatic head injury. Further, Esparza's criminal record, and his juvenile criminal records, were included in these reports as well as the disciplinary infractions he incurred while he was in jail. This information

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present sufficient mitigating evidence was not justified by a tactical decision to keep out petitioner's relatively tame juvenile record).

would not have been admitted, or at least not in such detail, if these reports had not been requested.[80]

The failure of defense counsel to investigate Esparza's background was both objectively unreasonable and prejudicial. The failure to investigate caused defense counsel to be unable to argue competently that Esparza was entitled to a psychologist who would aid the defense. This, in turn, led to the request for a pre-sentence investigation report which allowed the jury to consider damaging information which it would not have seen otherwise. The Court finds that Esparza has shown that his counsel's lack of preparation and ignorance of the effect of his decision to request a pre-sentence investigation and psychological report establish a "reasonable probability" that the outcome of the trial, but for counsel's ineffectiveness, would have been different. Therefore, the Court finds that Esparza's forty-fourth ground for relief is well-taken.[81]

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[80] This Court is at a loss to understand why the trial court did not attempt to prevent the obvious prejudice to Esparza from submission of an unexpurgated version of this report. While Ohio law seems to call for submission of a pre-sentence report, whenever requested by a defendant, that rule surely does not trump the rules of evidence or relieve the court of its obligation to guard against undue prejudice. It was completely inappropriate for the psychologists to put themselves in the role of judge and jury in this case, but that is essentially what their gratuitous comments attempted to do. In the interest of assuring a fair and reasoned consideration of the grave issue put to this jury, the trial court should have exercised some care over the matters to which the jury was exposed.

[81] Cynical observers might say that cases like *Williams*, *Carter*, *Rickman*, *Glenn* and this one provide a roadmap to

b. Trial Court's Denial of Continuance

Esparza's thirty-ninth claim is that the trial court violated his constitutional rights when it denied defense counsel's request for additional time to prepare for the sentencing hearing. This claim was raised on direct appeal, and respondent does not allege that it has been procedurally defaulted. Therefore, this Court will address this claim on its merits.

The trial court's decision to deny a continuance is within the discretion of the trial judge and depends on "facts and circumstances of that case with the trial judge considering the length of delay, previous continuances,

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counsel wishing to avoid imposition of the death penalty – do nothing, and the penalty will be set aside. Even if the Court were to believe that some counsel might adopt such a gravely speculative strategy (one that the state could easily thwart by sending cases back quickly for new sentencing proceedings or even mandating trial court oversight of counsel's preparation for that aspect of the case), it is simply not a concern *in this case*. This case was one of the early cases tried after the death penalty was re-instituted in this state. At that point, counsel then had no idea how federal courts might react to their efforts or lack thereof. There was, moreover, simply no way counsel could have prepared adequately for the mitigation phase of this particular case, given the extreme time constraints the court imposed upon them. Finally, the Court was able to observe the demeanor of Mr. Sparrow while testifying – he did not present himself as a man who believed he had out-maneuvered the Court. He appeared to be a truthful man, trying to explain the errors borne of his inexperience and the lack of time and resources afforded him.

inconvenience to litigants, witnesses, counsel and the court, whether the delay is purposeful or is caused by the accused, the availability of other competent counsel, the complexity of the case, and whether denying the continuance will lead to identifiable prejudice." *Wilson v. Mintzes*, 761 F.2d 275, 281(6th Cir. 1985)(citations omitted). The decision of the trial judge "will be reversed only for an abuse of discretion." *Id.*(citations omitted). The Supreme Court laid out the standard for whether the denial of a continuance deprives a defendant of his constitutional rights in *Ungar v. Sarafite*, 376 U.S. 575, 589-90 (1961). The Supreme Court stated:

> The matter of continuance is traditionally within the discretion of the trial judge, and it is not every denial of a request for more time that violates due process even if the party fails to offer evidence or is compelled to defend without counsel. Contrariwise, a myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality. There are no mechanical tests for deciding when a denial of a continuance is so arbitrary as to violate due process. The answer must be found in the circumstances present in every case, particularly in the reasons presented to the trial judge at the time the request is denied.

Id.

The Supreme Court of Ohio determined, based on the reasons presented to the trial judge for the continuance, that the denial of the continuance was not an abuse of discretion. *State v. Esparza*, 529 N.E.2d 192 (Ohio 1988). The Supreme Court of Ohio stated "[a]s the request was indefinite

as to duration and vague for its purpose, its denial was not an abuse of discretion." *Id.* at 196.

In the rare circumstances of this case, the Court finds the Ohio Supreme Court's decision to be an unreasonable application of federal law.[82] The trial judge in this matter was aware *both* that he had appointed trial counsel less than eight weeks before trial was to commence *and* that counsel was relatively inexperienced in capital cases when appointed. Both of Esparza's trial counsel had only handled one previous capital case. Indeed, the trial court appointed Esparza's counsel after experiencing difficulty with getting Esparza's prior counsel to comply with the court's trial schedule. When Esparza's counsel accepted the appointment, they did so at the personal request of the trial judge and with the understanding that the guilt phase of trial would commence when planned.[83] The trial court knew that, due to

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[82] The Court can conceive of very few circumstances under which a denial of a request for a continuance would fail to pass constitutional muster. In the circumstances presented here, the refusal to grant some additional time to prepare for the sentencing phase of the proceedings truly did render Esparza's right to defend with counsel "an empty formality." *Ungar*, 376 U.S. at 589-90.

[83] During the evidentiary hearing, Keithly Sparrow recounted how he became Esparza's counsel.

Q: When you were appointed you described a conversation with Judge Riley. Did that conversation include scheduling of Mr. Esparza's trial?

Sparrow: . . . my recollection of that conversation was that the judge was reasonably frustrated at having to get someone else involved, was telling me that there was some

the rigorous schedule it imposed on Esparza's counsel, counsel would have little or no time to prepare for both the guilt phase and the sentencing phase of the proceedings. The trial court also was aware, when the continuance was requested, that trial counsel, in fact, had *not* prepared for the sentencing phase of the proceedings. Rather than allow trial counsel the time to prepare themselves so that they could properly investigate both the law and the facts necessary to present mitigating evidence on Esparza's part, the court showed a "myopic insistence upon expeditiousness in the face of a justifiable request for delay." *See Ungar*, 376 U.S. at 590. The trial court, thus, bears at least partial responsibility for Esparza's counsel's ineffectiveness during the mitigation phase. In such circumstances, the Court finds it was impermissibly arbitrary for the trial court to deny a continuance to allow time to prepare for a portion of the proceedings which literally could mean the difference between life and death for a defendant. Esparza's thirty-ninth claim for relief, therefore, is well-taken.

c. Cumulative Error

Esparza's fifty-second claim is that the convictions and death sentence are unreliable due to cumulative error in the trial and sentencing phase. Accumulated errors are not tantamount to reversible error "if the prosecution can prove beyond a reasonable doubt that a constitutional error did not contribute to the verdict." *Satterwhite v. Texas*, 486 U.S. 249, 256 (1988). If error occurred, but without constitutional

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serious time constraints, and that before – he wanted to know could I do it in those time constraints, and that was the nature of the that conversation. My impression was that he was reasonably frustrated with the way the case had gone to that point.

significance, then the error is deemed harmless and the verdict sound. *Id.* The Court rejects Esparza's cumulative error claim as to the guilt phase of his trial but finds this claim well-taken as to the sentencing phase.

The Court has found that two of the grounds raised by Esparza in his petition justify the conclusion that the mitigation phase of this proceeding was constitutionally defective.[84] The Court is also troubled by the blanket introduction into evidence of the pre-sentence investigation and psychological reports. The reports were extremely prejudicial. They showed a lack of professionalism on the part of those who created them, with the psychologists, particularly, appearing to be taking sides and acting as adversaries against Esparza, rather than objective medical personnel. It is unclear why such a prejudicial report was created and even more unclear why the trial court allowed it, without alteration, into evidence. Although the Court has found that fault lies primarily with Esparza's counsel for requesting the reports without understanding that they normally are to be put before the jury, the enormous risk present in requesting a report resembles a spring-trap set by the state for unwary defendants. A simple, but uninformed, request results in the state being able to put as much damaging information as it can collect before the jury, and to support this damaging evidence with so-called "neutral" and

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[84] The Court also has found that Esparza's first claim for relief, that the indictment did not properly charge the elements of the capital offense and that the jury was, thus, never charged with the elements of that capital offense, is well-taken. Since this claim for relief, however, vitiates the need for the mitigation stage of the trial altogether, the Court does not include this claim in its cumulative error analysis of the mitigation stage of the proceedings.

"expert" witnesses who appear to be acting, in this case at least, as witnesses for the prosecution. The defense attorney, by making this request, essentially negates any of the protections the sentencing procedure is designed to afford a capital defendant.

The Court finds that Esparza's counsel's ineffectiveness during the sentencing phase of the trial, coupled with the trial judge's refusal to provide Esparza's counsel with a continuance to prepare for the sentencing phase of the trial, and the prejudicial effect of the blanket admission of the pre-sentence investigation report, including its psychological aspects, constitute cumulative error sufficient to mandate partial habeas corpus relief. Thus, although the Court did not find admission of the pre-sentence investigation materials constituted constitutional error standing alone, when viewed against the backdrop of the entire sentencing proceeding, that prejudicial and seemingly inexplicable decision provides a further ground to conclude that the imposition of the death penalty in this case was not done in conformance with the Constitution.[85]

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[85] As noted above, at footnote 1, two Ohio Supreme Court Justices found the Ohio procedure which mandates the blanket admission of any requested pre-sentence investigation report to be unconstitutional. This Court does not go so far. This Court finds, instead, that the trial court retained the authority under Rule 403 of the Rules of Evidence to redact portions of a pre-sentence investigation report before its submission to the jury and that its failure to exercise that authority contributed to the fundamental unfairness of the sentencing proceedings in this particular case.

Accordingly, the Court finds that Esparza's fifty-second ground for relief, as to the sentencing phase of the proceedings only, is well-taken.

D. Constitutional Violations Relating to Esparza's Appeals

1. Esparza's Fifty-third Claim

Esparza's fifty-third claim is that the actions and omissions of his appellate counsel on direct appeal violated his constitutional rights. Specifically, Esparza challenges his appellate counsel's failure to raise the following issues:

A. The prosecutor committed unconstitutional misconduct during the guilt phase.

B. Improper jury instructions were given during the guilt phase.

C. The jury was impartial because each juror served a commitment during voir dire that he or she could impose the death penalty.

D. Trial counsel was ineffective during the mitigation phase.

E. Hearsay evidence was improperly admitted.

F. The omissions and commissions of trial counsel violated Esparza's constitutional rights.

G. The denial of due process, equal protection and an impartial jury.

H. The prosecutor committed unconstitutional misconduct during the penalty phase.

I. The death sentence in Esparza's case is unreliable and inappropriate.

J. Improper jury instructions were given during the sentence phase.

Esparza also argues that his appellate counsel: (1) failed to ensure a complete record of proceedings was transferred to the appellate court, and, (2) deprived him of his right to information about and input into the direct appeals process. Esparza provides no further argument or factual basis for these claims.

A defendant is entitled to effective assistance of counsel in his first appeal as a matter of right. *Evitts v. Lucey*, 469 U.S. 387, 396 (1985). In this case, Esparza has not come close to showing his appellate counsel was ineffective. First, several of these arguments *were* raised on direct review by appellate counsel, and, thus, there was no failure to raise them.[86] Second, as to those claims that counsel did not raise, Esparza does not explain how his counsel's judgement was objectively unreasonable, and the Court finds it was not. Further, and of equal importance, Esparza has "failed to establish prejudice because he has not shown that the direct appeal of [those] issue[s] [that appellate counsel did not raise] would likely have been successful." *Leggett v. United States*, 1996 WL 665580 at *2 (6th Cir. Nov. 14, 1996). Accordingly, the Court finds Esparza's fifty-third ground for relief not well-taken.

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[86] For instance, claims relating to ineffectiveness of trial counsel, were presented to the Ohio courts, and have been discussed at length elsewhere in this Opinion.

2. Esparza's Fifty-Fourth Claim for Relief

Esparza's fifty-fourth claim is that the Ohio Court of Appeals review was flawed and, thus, violated his constitutional rights. Specifically, Esparza asserts that the Court of Appeals improperly found that a letter written by Esparza to his foster-parents was not admissible as mitigation evidence, and employed improper definitions of both mitigating and aggravating circumstances. The Court has already dealt with the merits of each of these claims and found them not well-taken. The Court, therefore, finds Esparza's fifty-fourth claim to be without merit.

E. Systemic challenges to Ohio's capital punishment scheme in general.

1. Esparza's Fifty-fifth Claim for Relief

Esparza's fifty-fifth ground for relief is aimed at the structure of Ohio's capital punishment scheme. In this claim, Esparza asserts that Ohio's capital punishment scheme is unconstitutional on its face. The Court is not persuaded by Esparza's allegations. In summary fashion, the Court will list below Esparza's allegations, in italics, and thereafter state the reasons they are unpersuasive.

- *The death penalty is not the least restrictive means of effectuating deterrence.* The Supreme Court addressed this point directly in *Gregg v. Georgia*, 428 U.S. 153 (1976). Noting that exacting criminal punishment is a legislative responsibility, the Court limited its own ability to "require the legislature to select the least severe penalty possible." *Id.* at 175.

- *The death penalty violates the Eighth Amendment prohibition against cruel and unusual punishment.*

This argument also was rejected in *Gregg*. *See Gregg*, 428 U.S. at 199 (holding death penalty per se not constitutionally barred).

- *Ohio's scheme is unconstitutionally arbitrary because it allows for prosecutorial discretion to determine whether to seek a capital indictment.* Once again, the Supreme Court in *Gregg v. Georgia*, 428 U.S. 153 (1976), rejected this argument under a similar death penalty statute, condoning the discretionary system.

- *Ohio's scheme is unconstitutional because it lacks specific standards for the imposition and review of a death sentence as it neither narrows the class of death-eligible defendants, individualizes the sentence during trial, nor determines the appropriateness of the sentence upon review.* The Supreme Court has articulated clearly the constitutional mandates for imposing the death penalty. In *Lockett v. Ohio*, 438 U.S. 586 (1978), the Court held that any death penalty statute must allow the sentencer to review all mitigating evidence during the penalty phase, thereby fashioning a sentence befitting the defendant particularly. Because death "is so profoundly different from all other penalties," the Court reasoned, it cannot be imposed without individualizing the sentence. *Id.* at 605. The Court further refined the statutory limiting requirement in *Zant v. Stephens*, 462 U.S. 862 (1983). In that case, the Court concluded that any death penalty statute must narrow the class of death-eligible defendants from those not death eligible. *Id.* at 877. Specifically, a state may choose either to legislatively limit the definition of death-eligible crimes, or it may broadly define capital offenses but narrow the defendants who actually receive a death sentence by using aggravating factors

during the penalty phase. *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1987).

Ohio's death penalty scheme complies with both these mandates. First, Ohio Rev. Code §§ 2929.04(B) and (C) allow the defendant to present, and the fact finder to consider, all statutorily enumerated mitigating factors. Moreover, § 2929.04(B)(7) permits a fact finder to consider all mitigating factors in addition to those enumerated in the statute. Finally, the Ohio death penalty scheme satisfies the *Zant* requirements by demanding the fact finder to find the existence of at least one aggravating factor set forth in § 2929.04(A).

Upon appeal, a reviewing court must determine whether the sentence imposed is appropriate. Ohio Rev. Code § 2929.05(A). Consequently, Ohio's scheme in determining which capital defendants actually receive the death penalty and review of the death sentence comport with constitutional mandates.

Ohio's scheme is unconstitutional because it fails to require that the State prove (a) the absence of any mitigating factors and/or (b) that the death penalty is the only appropriate remedy. Esparza's first argument was specifically rejected in *Walton v. Arizona*, 497 U.S. 639, 649-50 (1990). There, the Court held a death penalty scheme requiring the defendant to establish mitigating factors by a preponderance of evidence is constitutionally acceptable burden shifting. In Ohio, the burden on the defendant is even less, a burden to come forward with evidence of mitigating factors; the burden of persuasion remains with the state.

Esparza's second argument that the State must prove that the death penalty is the only appropriate remedy also is misplaced. No such constitutional mandate exits. Moreover, the Ohio scheme provides for an appropriateness review on direct appeal. *See* above.

Ohio's scheme is unconstitutional because a three-judge panel is not required to identify and articulate the existence of mitigating factors and aggravating circumstances. While the Supreme Court does "require that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed," *Gardner v. Florida*, 420 U.S. 349, 361 (1977), there is no actual criterion stating that the trial judge must identify and articulate the specific factors used to formulate the decision. Furthermore, Ohio Rev. Code § 2929.03(F) requires that a trial judge make a written finding as to the existence of specific mitigating factors and aggravating circumstances, and why the aggravating circumstances outweigh the mitigating factors. By making a record of these determinations, the appellate court is able to make an "independent determination of sentence appropriateness." *State v. Buell*, 489 N.E.2d 795, 807 (Ohio 1986), *cert. denied*, 479 U.S. 871 (1986). Thus, no constitutional infirmity exists.

Ohio's scheme is unconstitutional because the defendant must prove the presence of mitigating factors by a preponderance of evidence. As stated above, the Supreme Court accepted this penalty scheme in *Walton v. Arizona*, 497 U.S. 639 (1990).

- *Ohio's scheme is unconstitutional because aggravating factors are introduced during the guilt phase rather than the mitigation phase of trial.*[87] As addressed above, Ohio's scheme meets the constitutional requirements of both considering all mitigating evidence and sufficiently tailoring the sentence to the individual defendant.

- *Ohio's scheme is unconstitutional because it imposes a risk of death on those capital defendants who choose to exercise their right to trial.* In *United States v. Jackson*, 390 U.S. 570, 582 (1968), the Supreme Court determined that a legislative body cannot produce a chilling effect on a defendant's Fifth Amendment right not to plead guilty and Sixth Amendment right to demand a jury trial. In that case, the Court struck down the capital portions of a federal kidnaping statute because it authorized only the jury to impose the death sentence. Conversely, in Ohio "a sentence of death is possible whether a defendant pleads to the offense or is found guilty after a trial." *State v. Buell*, 489 N.E.2d 795, 808 (Ohio 1986). Consequently, the Ohio scheme comports with constitutional mandates.

- *Ohio's scheme is unconstitutional because it fails to provide an adequate proportionality review by comparing defendants who received the death penalty with others who received the death penalty rather than with those who received life sentences.* The

[87] Esparza contends that by requiring proof of the aggravating specifications simultaneously with guilt, Ohio's death penalty scheme fails to make a sufficiently individualized death penalty determination.

Supreme Court has determined that a comparative proportionality review is not constitutionally required. *Pulley v. Harris*, 465 U.S. 37 (1984).

- *Ohio's scheme is unconstitutional because it fails to provide the sentencing authority with an option to impose a life sentence when it finds only aggravating circumstances exist.* The Supreme Court rejected the identical argument in *Blystone v. Pennsylvania*, 494 U.S. 299 (1990).

2. Fifty-Sixth Ground for Relief

Esparza's fifty-sixth ground for relief is that the use of the same felony (aggravated robbery) to elevate the murder to aggravated murder *and* to elevate aggravated murder to capital murder violated his constitutional rights. Essentially, Esparza argues that Ohio's capital sentencing scheme does not, as it must, "genuinely narrow the class of persons eligible for the death penalty and . . . reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder." *Zant v. Stephens*, 462 U.S. 862, 877 (1983).[88] Esparza argues that the aggravating specification contained in Ohio Rev. Code § 2929.04(A)(7) merely duplicates the definition of felony murder in § 2903.01(B), and thus that the same act both convicts and aggravates.

To the extent this is a challenge to Ohio's statutory death penalty scheme, it must fail. As noted in *State v.*

[88] This is a facial challenge, as distinguished from Esparza's claim concerning the failure of the indictment to charge that he was, and the trial court's failure to instruct the jury that they must find him to be, the principal offender.

Jenkins, 473 N.E.2d 264 (Ohio 1984), *cert. denied*, 472 U.S. 1032 (1985), "while a conviction under R.C. 2903.01(B) cannot be sustained unless the defendant is found to have intended to cause the death of another, the state, in order to prevail upon an aggravating circumstance under R.C. 2929.04(A)(7), must *additionally* prove that the offender was the principal offender in the commission of the aggravated murder or, if the offender was not the principal offender, that the aggravated murder was committed with prior calculation and design." *Id.* at 280 n.17 (emphasis added). Thus, "[t]he trial court had to find that [Esparza] committed murder while committing or attempting to commit [aggravated robbery] *and, further,* that [Esparza] was the principal offender or that the murder was premeditated." *State v. Barnes*, 495 N.E.2d 922, 925 (Ohio 1986), *cert. denied*, 480 U.S. 926 (1987) (emphasis added). This additional factor does "narrow the class of persons eligible for the death penalty," *Zant*, 462 U.S. at 877, – if Esparza were found to have an accomplice, for instance, that "accomplice could be convicted of aggravated murder but would not be subject to the death penalty." *Id.* "By such a limitation, the category of death-eligible aggravated murderers is narrowed in compliance with *Zant* and no constitutional violation arises." *Id.*

Even if it were true that the same act both convicted and aggravated under § 2903.01(B) and § 2929.04(A)(7), moreover, this alone would not provide grounds for issuance of the requested writ. "[T]he fact that the aggravating circumstance duplicate[s] one of the elements of the crime does not [alone] make [a death] sentence infirm." *Lowenfield v. Phelps*, 484 U.S. 231, 246 (1988); *Tuilaepa v. California*, 512 U.S. 967, 972 (1994) ("The aggravating circumstance may be contained in the definition of the crime or in a separate sentencing factor (or in both)"). The narrowing function required by *Zant* may be performed by the state legislature. *Id.* at 246-47; *see id.* at 255 (Brennan, J., dissenting) ("the critical narrowing function may be performed [by the legislature] prior to and distinct from the sentencing process" to ensure "that the number of those eligible for the death penalty [are] smaller than the number of those convicted of murder"). With § 2929.04(A), the Ohio General Assembly "narrow[ed] the class of felony murders subject to the death penalty by excluding those who commit [murder in the course of an] arson, robbery, burglary or escape, unless they are charged with a different aggravating circumstance." *State v. Buell*, 489 N.E.2d 795, 807 (Ohio 1986), *cert. denied*, 479 U.S. 871 (1986). Thus, as long as there is a narrowing which occurs, the death penalty can be constitutionally imposed upon that narrower class of persons.

VIII. CONCLUSION

It is clear that the state of Ohio may, within certain well-established limitations, impose the death penalty upon offenders without running afoul of the United States Constitution. It is also clear that the Ohio legislature has adopted a statutory scheme for imposition of the death penalty which *can*, if appropriately followed, result in a constitutionally permissible sentence of death. It is also clear, however, that the manner in which the death penalty was imposed in this case fails to comport with the dictates of the Constitution.[89] No desire on the part of this Court to give

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[89] It would not have been difficult to assure the constitutional application of the death penalty in this case. Surely the prosecutor was aware of its obligation to charge and prove a capital specification prior to imposition of the death penalty and was aware of how to accomplish both of those things. Similarly, egregious mistakes of counsel, and the trial courts refusal to give counsel an adequate opportunity to prepare, were readily avoidable with little cost or inconvenience to the state. Finally, it would have taken very little time and effort

deference to the state court judgments, no matter how strong that desire might be, can justify turning a blind eye to the infirmities which permeated the charging decisions in and the mitigation phase of this capital case.

Accordingly, the Court grants Esparza's petition in part, and issues a writ of habeas corpus as follows. The respondent shall set aside Esparza's sentence of death and, instead, impose a life sentence under Ohio Rev. Code § 2929.03(A) for aggravated murder with no capital specification. The respondent shall re-sentence Esparza, within 180 days from the effective date of this Order. On this Court's own motion, execution of this Order and, hence, its effective date, is stayed pending appeal by the parties.

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on the trial courts part to redact what were clearly inappropriate and, to some extent, unfounded facts and opinions from the pre-sentence investigation report. While the constitution affords states great leeway in their decision to impose the death penalty, it requires a minimum of care in its application in a particular case. Evidence of that constitutionally mandated level of care is simply missing from the record in this case.

The Court hereby issues a certificate of appealability pursuant to 28 U.S.C. § 2253(c) as to all issues raised by petitioner and certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal in forma pauperis would not be frivolous and can be taken in good faith.

IT IS SO ORDERED.

KATHLEEN McDONALD O'MALLEY
UNITED STATES DISTRICT JUDGE

APPENDIX D

IN THE COURT OF APPEALS OF LUCAS COUNTY

State of Ohio	Court of Appeals No. L 84-225
Appellee	Trial Court No. CR 83-6603
v.	
Gregory Esparza	DECISION AND JUDGMENT ENTRY
Appellant	Decided: July 27, 1994

* * * * *

This matter is before the court on the motion of appellant Gregory Esparza to file an application for delayed reconsideration in excess of thirty pages and on the application for delayed reconsideration.

Initially, we are compelled to address the unique procedural posture of this case. On February 19, 1992, the Supreme Court of Ohio released its decision in *State v. Murnahan* (1992), 63 Ohio St. 3d 60, wherein the court recognized that claims of ineffective assistance of appellate counsel are to be raised first in an application for reconsideration or delayed reconsideration in the court of appeals, and, if denied in that court, then the defendant may raise the claim before the Supreme Court of Ohio. In footnote six of that decision, the court recommended that the Rules Advisory Committee amend the Appellate Rules to better serve claimants in this position.

On June 30, 1993, appellant filed in this court a ninety-four page application for delayed reconsideration wherein he asserted sixteen additional assignments of error which he contends his original appellate counsel should have raised on direct appeal to this court. Finding that appellant's brief exceeded thirty pages and that appellant had failed to file a motion for leave to file a brief in excess of thirty pages, this court, on August 4, 1993, *sua sponte* ordered that appellant's brief be returned to his counsel to be conformed to the Appellate Rules. Thereafter, appellant filed the present motion for leave to file a brief in excess of thirty pages, and subsequently filed two corrected applications which corrected other matters but did not conform the application to the thirty page requirement.

Meanwhile, in the August 23, 1993 edition of the Ohio State Bar Association Report, an amendment to App.R. 26 was published. The amendment adds to the Appellate Rules App.R.26(B) which governs motions for delayed reconsideration, now called applications to reopen an appeal. Moreover, App.R. 33 was also amended and now reads:

> "(M) Effective date of amendments. The amendments submitted by the Supreme Court to the General Assembly on January 8, 1993 and further revised and filed on April 30, 1993 shall take effect on July 1, 1993. They *govern all proceedings in actions brought after they take effect and also all further proceedings in actions then pending, except to the extent that their application in a particular action pending when the amendments take effect would not be feasible or would work injustice, in which event the former procedure applies.*"

Because appellant filed his original application for delayed reconsideration the day before the effective date of App.R. 26(B), the question now arises as to whether App.R. 26(B) applies to appellant's application for leave and ultimately to his application to reopen, or whether we are to apply the former procedure, which we construe to mean the Appellate Rules as they existed prior to July 1, 1993 as well as the procedures set forth in *Murnahan*. Under App.R. 26(B)(4), an application for reopening shall not exceed ten pages. Moreover, the rule does not provide for leave to file an application in excess of ten pages. Within these ten pages, an applicant must put forth a colorable claim of ineffective assistance of appellate counsel. If the applicant makes such a showing, the court will grant the application to reopen. Thereafter, appellate briefs and supporting materials compiled with the assistance of new counsel are to be filed as on an initial appeal.

In the present case, we conclude that applying App.R. 26(B) to this case, and in particular the ten page requirement, would be unjust. Forcing appellant to now comply with the requirements of App.R. 26(B), given that the new rule only became effective the day after appellant filed his original application, would not serve the ends of justice and would only delay this court's inevitable consideration of the issues appellant has raised. In addition, Rule V of the Supreme Court Rules of Practice provides that page limitations on appellate briefs before that court shall not apply in cases involving the death penalty. While we have no similar rule governing briefs filed in this court, placing page restrictions on what is essentially a continuation of an original appeal as of right could deny an appellant, who has been sentenced to death, the right to meaningful appellate review before this court and the Supreme Court of Ohio. As this is a case in which the death penalty has been imposed, and in the

interests of justice, we find appellant's motion to file the instant application in excess of thirty pages well-taken.

Delayed reconsideration is appropriate where a defendant can establish: (1) a colorable claim of ineffective assistance of appellate counsel; (2) that the application of *res judicata* would be unjust; and (3) that the time periods for reconsideration in the court of appeal and direct appeal to the state supreme court have expired. *Murnahan, supra*, at 66. In considering whether any substantive grounds for relief exist to show ineffective assistance of appellate counsel, the court may consider the motion, supporting affidavits, and all files and records that were originally submitted to the court of appeals as part of the appellate record.

The standard for evaluating an ineffective assistance of appellate counsel claim is the same as that for a claim of ineffective assistance of trial counsel. In *State v. Bradley* (1989), 42 Ohio St. 3d 136, paragraphs two and three of the syllabus, certiorari denied (1990), 497 U.S. 1011, the Supreme Court of Ohio enunciated that standard as follow:

> "2. Counsel's performance will not be deemed ineffective unless and until counsel's performance is proved to have fallen below an objective standard of reasonable representation and, in addition, prejudice arises from counsel's performance. (*State v. Lytle* [1976], 48 Ohio St. 2d 391; *Strickland v. Washington*, [1984], 466 U.S. 668, followed.)
>
> "3. To show that a defendant has been prejudiced by counsel's deficient performance, the defendant must prove that there exists a

> reasonable probability that, were it not for counsel's errors, the result of the trial would have been different."

Further, there is "a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance***." *Bradley, supra*, at 142, quoting *Strickland, supra*, at 689. Ohio presumes a licensed attorney is competent. *Vaughn v. Maxwell* (1965), 2 Ohio St. 2d 299, 301.

The pertinent facts of this case are as follows. Other relevant facts will be set forth as they become necessary. On October 13, 1983, the Lucas County Grand Jury returned a two count indictment against Gregory Esparza. The first count charged Esparza with the aggravated murder of Melanie Gerschultz, while committing aggravated robbery, in violation of R.C. 2903.01(B). To the first count were attached a firearm specification and a specification that the offense was committed while Esparza was committing aggravated robbery. The second count of the indictment charged Esparza with aggravated robbery, to which a firearm specification was attached.

After a jury trial, Esparza was convicted of both counts and all specifications. After further deliberations, the jury recommended that Esparza receive the death sentence. The trial judge then independently weighed the aggravating factor and the mitigating circumstances and adopted the jury's recommendation, imposing the death sentence on May 22, 1984.

Subsequently, this court and the Supreme Court of Ohio affirmed appellant's convictions and sentence. See *State v. Esparza* (Aug. 22, 1986), Lucas App. No. L-84-225, unreported; *State v. Esparza* (1988), 39 Ohio St. 3d 8,

certiorari denied (1989), 490 U.S. 1012. Thereafter, Esparza filed a petition for post-conviction relief with the Lucas County Court of Common Pleas. On June 19, 1990, that court dismissed the petition on the state's motion. Esparza then appealed that dismissal to this court, which affirmed the dismissal in all respects on May 29, 1992.

Appellant has now filed the present motion for delayed reconsideration in which he asserts that his original appellate counsel was ineffective for failing to raise the following assignments of error in the original appeal of his conviction and sentence to this court:

> *"ASSIGNMENT OF ERROR NO. I*
> APPELLANT ESPARZA'S DEATH SENTENCE IS VOID AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.
>
> *"ASSIGNMENT OF ERROR NO. II*
> APPELLANT ESPARZA'S SENTENCE OF DEATH IS IN VIOLATION OF THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION BECAUSE THE TRIAL COURT AND APPELLATE COUNSEL FAILED TO ENSURE A COMPLETE RECORD OF THE PROCEEDINGS.
>
> *"ASSIGNMENT OF ERROR NO. III*
> MISCONDUCT BY THE GOVERNMENT'S ATTORNEYS DURING THE GUILT DETERMINATION PHASE OF APPELLANT ESPARZA'S CAPITAL TRIAL DEPRIVED HIM OF HIS RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE DETERMINATION

OF HIS GUILT AND PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNTIED STATES CONSTITUTION.

"ASSIGNMENT OF ERROR NO. IV
THE TRIAL COURT COMMITTED NUMEROUS ERRORS IN INSTRUCTING THE JURY IN THE GUILT DETERMINATION PHASE OF APPELLANT ESPARZA'S CAPITAL TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION. AS A RESULT, APPELLANT'S CONVICTIONS AND DEATH SENTENCE ARE CONSTITUTIONALLY INFIRM.

"ASSIGNMENT OF ERROR NO. V
APPELLANT ESPARZA WAS DENIED HIS RIGHT TO A FAIR TRIAL BY AN IMPARTIAL JURY IN A CAPITAL CASE, AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, BECAUSE THE TRIAL COURT SECURED FROM EACH JUROR WHO SERVED A COMMITMENT DURING VOIR DIRE THAT HE OR SHE COULD IMPOSE THE DEATH PENALTY.

"ASSIGNMENT OF ERROR NO. VI
APPELLANT ESPARZA'S CONVICTIONS AND SENTENCES ARE UNRELIABLE BECAUSE THE COURT COMMITTED ERRORS IN THE SENTENCING OPINION IN VIOLATION OF THE SIXTH, EIGHTH AND

FOURTEENTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

"ASSIGNMENT OF ERROR NO. VII
THE ACTIONS OF TRIAL COUNSEL DEPRIVED MR. ESPARZA OF HIS RIGHT TO THE EFFECTIVE ASSISTANCE OF COUNSEL DURING THE MITIGATION PHASE OF HIS TRIAL IN VIOLATION OF THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"ASSIGNMENT OF EROR NO. VIII
TESTIMONY BY A STATE PSYCHOLOGIST AT THE MITIGATION PHASE, OVER DEFENSE OBJECTION, VIOLATED APPELLANT'S FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"ASSIGNMENT OF ERROR NO. IX
THE ADMISSION OF HEARSAY EVIDENCE VIOLATED APPELLANT'S RIGHTS OF CONFRONTATION OF WITNESSES AND DUE PROCESS UNDER THE SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"ASSIGNMENT OF ERROR NO. X
THE OMISSIONS AND COMMISSION OF MR. ESPARZA'S TRIAL COUNSEL VIOLATED MR. ESPARZA'S RIGHTS AS GUARANTEED BY THE SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"*ASSIGNMENT OF ERROR NO. XI*
MR. ESPARZA WAS DENIED HIS RIGHTS TO DUE PROCESS, EQUAL PROTECTION AND AN IMPARTIAL JURY UNDER THE FIFTH, SIXTH, AND FOURTEENTH AMEND-MENTS TO THE UNITED STATES CONSTITUTION.

"*ASSIGNMENT OF ERROR NO. XII*
CONSIDERATION BY THE JURY OF NON-STATUTORY AGGRAVATING CIRCUM-STANCES AT THE PENALTY PHASE VIOLATED APPELLANT'S RIGHTS TO DUE PROCESS AND A FAIR AND RELIABLE DETERMINATION OF HIS DEATH SENTENCE.

"*ASSIGNMENT OF ERROR NO. XIII*
THE TRIAL COURT'S ADMISSION OF THE PRESENTENCE INVESTIGATION WHICH WAS REVIEWED BY THE JURY DURING THE MITIGATION PHASE VIOLATED APPELLANT ESPARA'S [*sic*] RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"*ASSIGNMENT OF ERROR NO. XIV*
THE ADMISSION OF APPELLANT'S STATEMENT TO THE LUCAS COUNTY PROBATION DEPARTMENT, VIOLATED APPELLANT'S RIGHTS AS GUARANTEED BY THE FIFTH, SIXTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"*ASSIGNMENT OF ERROR NO. XV*
MISCONDUCT BY THE GOVERNMENT'S ATTORNEY AT THE PENALTY PHASE OF APPELLANT ESPARZA'S CAPITAL TRIAL DEPRIVED HIM OF HIS RIGHTS TO DUE PROCESS, A FAIR TRIAL, AND A RELIABLE DETERMINATION OF HIS PUNISHMENT, AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"*ASSIGNMENT OF ERROR NO. XVI*
MR. ESPARZA'S DEATH SENTENCE IS UNRELIABLE, INAPPROPRIATE, AND VIOLATES THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES [*SIC*]."

I.

Under his first assignment of error, Esparza contends that his death sentence is void in that the state failed to allege and the jury failed to find all of the elements of a capital specification. In particular, appellant asserts that the indictment failed to allege a death penalty specification because it did not allege that he was either the principal offender or that he committed the aggravated murder with prior calculation and design. Appellant further asserts that the jury instructions at the guilt phase of his trial below were similarly defective.

On his original appeals before this court and the Supreme Court of Ohio, appellant asserted that his conviction was against the manifest weight of the evidence. Upon review, both this court and the Supreme Court determined that the verdict was not against the manifest weight of the

evidence. In so finding, both courts necessarily determined that after viewing the evidence in a light most favorable to the prosecution, any rational trier of fact could have found the essential elements of the crimes proven beyond a reasonable doubt. See *State v. Jenks* (1991), 61 Ohio St. 3d 259. Additionally, this court, in its decision of May 29, 1992, reviewing appellant's post-conviction appeal, addressed the merits of this assignment of error and found it not well-taken. As such, we find that there are no substantive grounds for relief under this assignment of error.

II.

Under his second assignment of error, appellant contends that the trial court and his original appellate counsel failed to ensure a complete record of the trial court proceedings. As a result, appellant contends, this court as well as the Supreme Court did not have the ability to review the entire proceedings of his capital trial. In particular, appellant notes that his original appellate counsel failed to avail themselves of App.R. 9(E) so as to include in the appellate record unrecorded bench conferences, untranscribed stenographer's notes and exhibits from an *ex parte* certification of witnesses hearing, verdict forms, a complete trial transcript, and exhibits admitted at trial.

We first note that the verdict forms, complete trial transcript and trial exhibits were ordered admitted in the record on appeal from appellant's petition for post-conviction relief. Despite appellant's assertion of sixteen assignments of error which challenged the trial court's dismissal of fifty causes of action, this court found the "enhanced" record to not have any marked effect on appellant's case.

More troublesome is the issue of the untranscribed stenographer's notes and exhibits from an *ex parte*

certification of witnesses hearing. such hearings are authorized by Crim.R. 16(B)(1)(e), which allows the prosecuting attorney to not disclose to the defense the name and address of a witness where disclosure may subject the witness or others to physical or substantial economic harm or coercion. In *State v. Owens* (1975), 51 Ohio App.2d 132, the court determined that:

> "The holding of an in-camera hearing with regard to the refusal of the state to supply the name of an adverse witness to the accused, pursuant to Crim.R. 16(B)(1)(e), is not error unless it precludes the issue from being properly reviewed on appeal." *Id.* at paragraph three of the syllabus.

The Supreme Court of Ohio cited this holding with approval in *State v. Williams* (1986), 23 Ohio St.3d 16, 18, certiorari denied (1987), 480 U.S. 923, in which the court held that a criminal defendant's right to confront the witnesses against him is legitimately constrained by Crim.R. 16(B)(1)(e) so long as the state's reasons for requesting witness protection appear on the record for purposes of appellate review. After the trial, the reasons for withholding the identity of a witness no longer exist and, in fact, the witness' identity has been revealed.

There is no question that the certification proceeding at issue was recorded and sealed. The transcript of that hearing, however, was not before this court on our original review of appellant's conviction and sentence. In *State v. Gillard* (1988), 40 Ohio St.3d 226, certiorari denied (1989), 492 U.S. 925, the Supreme Court of Ohio held:

> "When the state seeks to obtain relief from discovery or to perpetuate testimony under Crim.R. 16(B)(1)(e), the judge who disposes of

> such a motion may not be the same judge who will conduct the trial." *Id.* at paragraph one of the syllabus.

In that capital murder case, the court reasoned that when a judge hears evidence in a certification hearing that a defendant has attempted to harm, coerce or intimidate a witness, and that judge then presides over the trial, the appearance of fairness is impaired and fairness itself is jeopardized. *Id.* at 229. Because appellant's original appellate counsel did not seek to have the transcripts from the certification hearing supplemented into the record on appeal, they could not determine whether there might have been reversible error in that hearing.

We therefore find that appellant has put forth a colorable claim of ineffective assistance of appellate counsel on this issue. We note, however, that in *Gillard, supra*, at 234, the court further held that a violation of the rule stated above is not *per se* prejudicial, and appellant will have to establish both that an error occurred at that hearing and that absent that error, the outcome of the case would have been different.

III.

Because the third and fifteenth assignments of error raise the issue of prosecutorial misconduct, we will address them together. Under his third assignment of error, appellant cites several instances of alleged prosecutorial misconduct during the guilt determination phase of his trial which he contends deprived him of his constitutional rights to due process, a fair trial and a reliable determination of his guilt and punishment. Particularly, appellant contends that the prosecutor bolstered the testimony of Albert Richardson, improperly editorialized on testimony of the state's witness

Alexander, engaged in excessive leading of the state's witnesses on direct examination, and engaged in misconduct during closing arguments. In his fifteenth assignment of error, appellant cites numerous instances of alleged prosecutorial misconduct during the penalty phase of the trial below which he contends deprived him of a fair determination of his sentence. To summarize, he alleges that the prosecutor argued the existence of non-statutory aggravating circumstances and referred to circumstances (plural) despite the existence of only one, made erroneous and misleading statements regarding mitigating factors, misstated evidence, engaged in misconduct during examination and cross-examination of witnesses, and misstated the legal standards applicable to the case.

The Supreme Court of Ohio has held that "[t]he conduct of a prosecuting attorney during trial cannot be made a ground of error unless the conduct deprives defendant of a fair trial." *State v. Apanovitch* (1987), 33 Ohio St.3d 19, 24. In this light, the court has stated:

> "Time and again we see [prosecutorial and defense] counsel misconduct which in many cases would appear to be grounds for reversal and the vacating of convictions and/or sentences. In cases where the evidence of guilt is overwhelming and the statutory criteria have been met for both conviction and sentence of death, we have not chosen this alternative except in rare instances." *State v. Depew* (1988), 38 Ohio St.3d 275, 288, certiorari denied (1989), 489 U.S. 1042.

In the present case there was overwhelming evidence of appellant's guilt of the crimes charged, as was stated by the Ohio Supreme Court. In addition, both this court and the Ohio Supreme Court found that appellant's conviction was

not against the manifest weight of the evidence. In particular, we note that appellant's own sister testified that he had confessed the crimes to her. Accordingly, any prosecutorial misconduct which may have occurred during the guilt determination phase of the capital trial did not amount to reversible error.

As to the alleged errors at the penalty phase of the trial below, we find that any such errors were cured by the jury instructions. In particular part, the court charged:

> "You must not be influenced by any consideration of sympathy or prejudice. It is your duty to carefully weigh the evidence, to decide all disputed questions of fact, to apply the instructions of the court to your finding, and to render your verdict accordingly. In fulfilling your duty, your efforts must be to arrive at a just verdict. Consider all the evidence and make your finding with intelligence and impartiality, and without bias, sympathy or prejudice, so that the state of Ohio and the defendant will feel that their case was fairly and impartially tried."

Moreover, the trial court, this court and the Ohio Supreme Court each independently weighed the aggravating circumstance and the mitigating factors and concluded that appellant's convictions and death sentence were appropriate.

Given these considerations, appellant has failed to establish that the outcome of either phase of his capital trial would have been different absent these instances of alleged misconduct, and has therefore failed to raise substantive grounds for relief under the third and fifteenth assignments of error.

IV.

In his fourth assignment of error, appellant asserts that the trial court committed numerous errors in instructing the jury in the guilt determination phase of appellant's capital trial, in violation of appellant's constitutional rights. This court and the Supreme Court of Ohio, however, have already determined that appellant's conviction was not against the manifest weight of the evidence. As such, any error in the jury instructions was harmless, and appellant has not set forth substantive grounds for relief.

V.

In his fifth assignment of error, appellant asserts that he was denied his right to a fair trial by an impartial jury because the trial court secured from each juror who served a commitment during voir dire that he or she could impose the death penalty. It is well-settled that "[t]o death-qualify a jury prior to the guilt phase of a bifurcated capital prosecution does not deny a capital defendant a trial by an impartial jury." *State v. Jenkins* (1984), 15 Ohio St.3d 164, paragraph two of the syllabus, certiorari denied (1985), 472 U.S. 1032. Moreover, the Supreme Court dealt with this issue under appellant's ninth proposition of law before that court and found it not well-taken. Appellant has, therefore, failed to put forth substantive grounds for relief.

VI.

Appellant's sixth assignment of error asserts that his convictions and sentences are unreliable because the court committed errors in its sentencing opinion in violation of appellant's constitutional rights. Specifically, appellant contends that he was prejudiced because he was sentenced to death based on erroneous legal conclusions and improper

sentencing considerations. Because both this court and the Ohio Supreme Court independently weighed the aggravating circumstance and the mitigating factors and reached the same conclusion as the trial court, any error in the trial court's decision was harmless, and appellant has failed to establish a substantive ground for relief.

VII.

In his seventh assignment of error, appellant contends that he was denied the effective assistance of trial counsel during the mitigation phase of his capital trial. Appellant cites thirty-one individual instances in which he claims his trial counsel was ineffective. This court thoroughly addressed the issue of trial counsel's alleged ineffectiveness at the mitigation phase in our decision and judgment entry of May 29, 1992. Upon a complete review of the mitigation hearing and evidence we concluded that trial counsel reasonably investigated and prepared for the sentencing phase of the trial and provided appellant with effective assistance at this phase. Accordingly, appellant has not raised a substantive ground for relief in his seventh assignment of error.

VIII.

Under his eighth assignment of error, appellant asserts that the testimony of a state psychologist, Dr. Cassell, at the mitigation phase, over appellant's objection, violated his constitutional rights. Specifically, appellant argues that the state was permitted to call a state psychologist to testify at the mitigation hearing for non-rebuttal purposes and that this testimony distorted the weighing process against him in that Cassell essentially testified that the statutory mitigation factors did not exist. We see this as simply a restatement of the first proposition of law before the Ohio Supreme Court,

where appellant argued that Cassell's testimony presented the jury with non-statutory aggravating circumstance evidence. Because that court rejected the argument, so do we. As such, appellant has failed to raise substantive grounds for relief under his eighth assignment of error.

IX.

In his ninth assignment of error, appellant contends that the admission of hearsay evidence at the guilt phase of his capital trial violated his rights of confrontation and due process. Appellant cites to the testimony of Gary Krieger, the son of the owner of the Island Variety Carry Out, who testified that following the robbery and shooting, he received a telephone call at the store. While he could not identify the caller, he did testify, over the objection of appellant's trial counsel, that the caller, a male, asked if there had been a holdup and if anyone was hurt. Appellant asserts that the admission of this hearsay evidence violated his rights under the Sixth Amendment's confrontation clause. Appellant further asserts that the admission of this evidence was prejudicial because it bolstered the prior testimony of his cellmate, Albert Richardson, who had testified that appellant told him that he had telephoned the store after the robbery.

Hearsay is an out of court statement offered into evidence to prove the truth of the matter asserted. Evid.R. 801(C). Evid.R. 803 clearly states that hearsay evidence is not admissible except as otherwise provided by law. "A statement is not hearsay if it is admitted to prove that the declarant made it, rather than to prove the truth of its contents." *State v. Williams* (1988), 38 Ohio St.3d 346, 348, certiorari denied (1989), 489 U.S. 1040. At the trial below, the state argued that the testimony was being offered to prove

that the call was made, not to prove the truth of the matter asserted. On this basis, the court allowed the evidence to be admitted.

The sole fact that the call was made is irrelevant. Only when this evidence is combined with the testimony of Richardson does the statement have meaning, *i.e.*, it bolsters the testimony of Richardson. As such, the statement's contents were used to prove the truth of the matter asserted, namely Richardson's prior testimony that appellant telephoned the store after the robbery. *Id.* As such, the testimony was improperly admitted hearsay.

Our inquiry, however, does not end there, for only if the error constituted prejudicial error can it be grounds for reversal. The Supreme Court of Ohio has determined:

> "To be deemed nonprejudicial, error of constitutional dimension must be harmless beyond a reasonable doubt.
>
> "***
>
> "Where constitutional error in the admission of evidence is extant, such error is harmless beyond a reasonable doubt if the remaining evidence, standing alone, constitutes overwhelming proof of defendant's guilt." *State v. Williams* (1983), 6 Ohio St.3d 281, paragraphs three and six of the syllabus, certiorari denied (1983), 464 U.S. 1020.

In its review of this case, the Supreme Court of Ohio found overwhelming evidence of appellant's guilt beyond a reasonable doubt. Given this conclusion, we cannot say that the admission of this hearsay evidence amounted to prejudicial error. In particular, we note that even absent any

testimony by Richardson, there was substantial evidence upon which a jury could reasonably conclude that all the elements of the offenses charged were proven beyond a reasonable doubt. As such, appellant's ninth assignment of error raises no substantive grounds for relief.

X.

Appellant's tenth proposed assignment of error asserts that his trial counsel's performance during the guilt phase of his capital trial was deficient and failed to meet the prevailing 1983 standards for Ohio attorneys in a capital case. Specifically, appellant contends that his trial counsel breached their duty by failing to conduct a thorough pretrial investigation, failing to obtain expert assistance, failing to adequately voir dire the prospective jury, failing to obtain witness statements prior to trial, failing to object to the prosecutor's closing argument, calling Else Dile as a defense witness, failing to request or object to certain jury instructions at the guilt phase of the trial below, and failing to object to the invalid death penalty specification in the indictment.

In Ohio, a properly licensed attorney is presumed competent and the burden is upon appellant to show connsel's ineffectiveness. *State v. Hamblin* (1988), 37 Ohio St.3d 153, 155-156, certiorari denied (1988), 488 U.S. 975. In *Strickland, supra*, the court set forth a two-part test for reviewing claims of counsel ineffectiveness. First, appellant must establish that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, appellant must establish that the deficient performance prejusiced appellant. *Id.* at 687. In determining whether appellant was prejudiced by the ineffectiveness, the *Strickland* court set forth the following guiding principles:

"***[A] court hearing an ineffectiveness claim must consider the totality of the evidence before the judge or jury. Some of the factual findings will have been unaffected by the errors, and factual findings that were affected will have been affected in different ways. Some errors will have had a pervasive effect on the inferences to be drawn from the evidence, altering the entire evidentiary picture, and some will have had an isolated, trivial effect. Moreover, a verdict or conclusion only weakly supported by the record is more likely to have been affected by errors than one with overwhelming record support. Taking the unaffected findings as a given, and taking due account of the effect of the errors of the remaining findings, a court making the prejudice inquiry must ask if the defendant has met the burden of showing that the decision reached would reasonably likely have been different absent the errors." *Id.* at 695-696.

Upon a thorough review of the record in this case, as well as our previous decisions and the decision of the Ohio Supreme Court affirming appellant's conviction and sentence, we conclude that appellant has failed to establish that the outcome of his trial would have been different had his trial counsel not committed the alleged errors. In particular, we note that even absent these alleged errors, appellant's own sister testified that appellant confessed to her that he committed the crimes. Finally, it is worth noting that the Supreme Court in its review of this case on direct appeal determined that the record amply reflected the efforts of trial counsel to ensure that a qualified, unbiased jury was empaneled, and that trial counsel presented a thorough, diligent defense.

Appellant's tenth proposed assignment of error, therefore, raises no substantive grounds for relief.

XI.

Appellant's eleventh assignment of error asserts that he was denied his rights to due process and an impartial jury when the court failed to declare a mistrial after learning that prospective jurors exposed themselves to publicity about the trial. Appellant contends that prospective juror Hoffman heard a radio broadcast about the case after the court admonished the venire to avoid media exposure, and that prospective juror Bear reported during voir dire that while waiting to be examined she and other jurors discussed the case. Although neither Hoffman nor Bear were impaneled, appellant faults the court's failure to inquire further of the venire as to which other jurors may have also been exposed to this publicity from the prospective jurors, and alleges that this error denied him the rights of due process and an impartial jury.

It is well-established that,

"It is not error to impanel a jury who has been exposed to pretrial publicity when they state that they can be fair and impartial and base their verdict on the evidence that is presented at trial." *State v. Booher* (1988), 54 Ohio App.3d 1, 14.

A review of the transcript of the voir dire proceedings in this case reveals that the lower court ascertained from each of the jurors impaneled that he or she could set aside any preconceived notions of the case and base the verdict on the

evidence presented at trial. As such, appellant's eleventh assignment of error fails to raise any substantive grounds for relief.

XII.

In his twelfth assignment of error, appellant contends that his rights to due process and to a fair and reliable determination of his sentence were violated when the jury was permitted to consider at the penalty phase of the capital trial, non-statutory aggravating circumstance evidence. In particular, appellant asserts that the lower court erred in admitting for consideration the psychological report on appellant prepared by the Court Diagnostic and Treatment Center. Appellant argues that the report was prejudicial because it contained projections as to his future dangerousness. The Supreme Court thoroughly addressed the issue of the admissibility of the psychological report under the first proposition of law, *Esparza, supra*, at 9-11, and found that the jury was properly instructed on the aggravating circumstance and mitigating factors it was to consider. As such, appellant has raised no substantive grounds for relief under his twelfth assignment of error.

XIII.

Under his thirteenth assignment of error, appellant contends that the admission of the presentence investigation report, which was reviewed by the jury during the penalty phase of the trial below, violated his constitutional rights. In particular, appellant argues that the report was prejudicial to him because it comented on his exercise of his right to remain silent and included improper impeachment evidence. This evidence, appellant contends, injected into the penalty determination phase a non-statutory aggravating circumstance and therefore produced an unreliable result.

Thr Supreme Court has already approved of the submission of the presentence report to the jury under appellant's first proposition of law before that court. Appellant has therefore failed to establish substantive grounds for relief under this assignment of error.

XIV.

Appellant's fourteenth assignment of error raises an issue substantially similar to the thirteenth assignment of error. Here appellant contends that the admission of his statements to the probation department during the presentence investigation, without informing him of his *Miranda* rights prior to his making those statements, violated his constitutional rights. In the court below, appellant requested the presentence report. R.C. 2929.03(D) requires that when a defendant requests such a report, it must be given to the jury. As we stated *supra*, the Supreme Court has already ruled that the report was properly admitted at the penalty phase below. Accordingly, appellant has failed to raise a substantive ground for relief under the fourteenth assignment of error.

XV.

Finally, appellant asserts in his sixteenth assignment of error that his death sentence is unreliable, inappropriate and unconstitutional because the legal proceedings against him contained too many errors to result in a reliable imposition of the death penalty. Because we have recognized above that appellant has put forth a colorable claim of ineffective assistance of appellate counsel under the second assignment of error, we must also conclude that appellant has at least put forth a colorable claim under this proposed assignment of error as well.

Upon consideration whereof, we find appellant's motion for delayed reconsideration well-taken in part. This appeal is hereby reopened for the limited purpose of considering the second assignment of error asserted above. We further order that the previously sealed transcripts and any sealed exhibits from the certification of witnesses hearing be prepared and filed with this court under seal on or before August 15, 1994, and that only counsel for the parties may have access to the sealed portions of the record. Thereafter, the appeal will proceed as provided in the Rules of Appellate Procedure. It is so ordered.

Peter M. Handwork, J. _____
JUDGE

George M. Glasser, J. _____
CONCUR JUDGE

James R. Sherck, J., concurs in part, and dissents in part.

SHERCK, J. I concur in the majority opinion except for the majority's handling of appellant's fifteenth assignment of error. I believe appellant has established a colorable claim of ineffective assistance of counsel under that assignment of error.

APPENDIX E

IN THE COURT OF APPEALS OF LUCAS COUNTY

STATE OF OHIO	COURT OF APPEALS NO. L-90-235
Appellee	Trial Court No. 83-6603
v.	
Gregory Esparza	DECISION AND JOURNAL ENTRY
Appellant	Decided: May 29, 1992

* * * * *

Randall M. Dana, Ohio Public Defender and Jerry L. McHenry, Pamela A. Conger, Assistant State Public Defenders for appellant.

Anthony G. Pizza, prosecuting attorney and George J. Conklin and Mary Sue Barone, for appellee.

* * * * *

This case is before us on appeal from a judgment of the Lucas County Court of Common Pleas, wherein the court dismissed the petition for post-conviction relief of petitioner-appellant, Gregory Esparza. Esparza has assigned the following as error:

"ASSIGNMENT OF ERROR NO. I
THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S POST-CONVICTION RELIEF PETITION WITHOUT ACCORDING HIM AN EVIDENTIARY HEARING.

"ASSIGNMENT OF ERROR NO. II
THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT APPELLANT HAD BEEN DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

"ASSIGNMENT OF ERROR NO. III
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 3, 4, 10, 11, 37 AND 38 BECAUSE THE ADMISSION OF NUMEROUS PREJUDICIAL UNWARNED STATEMENTS OF APPELLANT ESPARZA VIOLATED HIS RIGHTS TO COUNSEL, AND AGAINST SELF INCRIMINATION AND CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"ASSIGNMENT OF ERROR NO. IV
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 1, 3, 4, 7, 9, 16, 17, 37 AND 38 BECAUSE APPELLANT ESPARZA WAS DENIED INDEPENDENT AND COMPETENT EXPERT ASSISTANCE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

"ASSIGNMENT OF ERROR NO. V
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 17, 36, 37, 38, 39, 40, 44 WITHOUT HEARING BECAUSE THE ADMISSION OF AN OVERWHELMING AMOUNT OF NON-STATUTORY AGGRAVATING CIRCUMSTANCE EVIDENCE IN APPELLANT'S CAPITAL SENTENCING HEARING VIOLATED HIS RIGHTS OF DUE PROCESS AND AGAINST CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE FIFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"ASSIGNMENT OF ERROR NO. VI
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 1, 3, 8, 14, 15, 16, 43 AND 50 WITHOUT HEARING BECAUSE THE JURY WAS PRECLUDED FROM CONSIDERING RELEVANT MITIGATION EVIDENCE IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 9, ARTICLE I, OF THE OHIO CONSTITUTION.

"ASSIGNMENT OF ERROR NO. VII
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 35, 36, 39 AND 40 WITHOUT A HEARING BECAUSE THE STATE'S MISCONDUCT AT BOTH PHASES OF TRIAL DEPRIVED APPELLANT ESPARZA OF HIS RIGHT TO A FAIR TRIAL AND RELIABLE DETERMINATION OF PENALTY AS

GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT [*sic*] TO THE UNITED STATES CONSTITUTION AND SECTIONS 2, 9, 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

"ASSIGNMENT OF ERROR NO. VIII
THE TRIAL COURT ERRED IN FAILING TO FIND THAT APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS DETAILED IN THE THIRTY SEVENTH, FORTY THIRD AND FIFTEENTH [*sic*] CAUSES OF ACTION IN APPELLANT'S PETITION FOR POST-CONVICTION.

"ASSIGNMENT OF ERROR NO. IX
APPELLANT ESPARZA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL AND HE WAS PREJUDICED THEREBY IN VIOLATION OF HIS RIGHTS UNDER THE UNITED STATES AND OHIO CONSTITUTION.

"ASSIGNMENT OFF [*sic*] ERROR NO. X
APPELLANT'S CONVICTION AND DEATH SENTENCE WAS [*sic*] NOT SUSTAINED BY SUFFICIENT EVIDENCE.

"ASSIGNMENT OF ERROR NO. XI
THE TRIAL COURT ERRED IN DISMISSING THE EIGHTEENTH, NINETEENTH AND TWENTIETH CAUSES OF ACTION OF APPELLANT'S POST-CONVICTION RELIEF PETITION, WHICH CONCERNED IMPROPER AND PREJUDICIAL JURY INSTRUCTIONS

DURING BOTH THE GUILT AND PENALTY PHASE OF APPELLANT' [*sic*] TRIAL.

"ASSIGNMENT OF ERROR NO. XII
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 3, 4, 6, 9, 10, 37 AND 38 WITHOUT HEARING BECAUSE EVIDENT [*sic*] COMMENTING ON HIS SILENCE WAS ADMITTED AGAINST HIM DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL.

"ASSIGNMENT OF ERROR NO. XIII
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 1, 12, 36, 37 AND 39 WITHOUT HEARING BECAUSE VICTIM IMPACT EVIDENCE ADMITTED DURING THE PENALTY PHASE VIOLATED APPELLANT ESPARZA'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"ASSIGNMENT OF ERROR NO. XIV
THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S POST-CONVICTION RELIEF PETITION IN WHICH HE DETAILED ERRORS IN THE VOIR DIRE OF HIS JURY WHICH DEPRIVED APELLANT OF HIS CONSTITUTIONAL RIGHTS.

"ASSIGNMENT OF ERROR NO. XV
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 19, 34, 35, 45, 46, 47, 48 AND 49 BECAUSE OHIO'S DEATH PENALTY STATUTES ARE UNCONSTITUTIONAL, ESPECIALLY AS APPLIED TO MR. ESPARZA."

On October 13, 1983, the Lucas County Grand Jury returned a two count indictment against Gregory Esparza. The first count charged Esparza with the aggravated murder of Melanie Gerschultz, while committing aggravated robbery, in violation of R.C. 2903.01(B). To the first count were attached a firearm specification and a specification that the offense was committed while Esparza was committing aggravated robbery. The second count of the indictment charged Esparza with aggravated robbery, to which a firearm specification was attached.

After a jury trial, Esparza was convicted of both counts and all specifications. After further deliberations the jury recommended that Esparza receive the death sentence. The trial judge then independently weighed the aggravating factor and the mitigating circumstances and adopted the jury's recommendation, imposing sentence on May 22, 1984.

Subsequently, Esparza exhausted his direct appeals and on November 29, 1989 filed a petition for post-conviction relief pursuant to R.C. 2953.21. The petition listed fifty causes of action[1] wherein Esparza asserted that he had been denied his rights under the Ohio and United States Constitutions, and requested an evidentiary hearing pursuant to R.C. 2953.21. In response, the state filed a motion to dismiss, alleging that Esparza's claims were barred by the doctrine of *res judicata* and that Esparza failed to set forth evidentiary documents containing sufficient operative facts to demonstrate ineffective assistance of counsel. The trial court did not order a hearing on the matter, and in its findings of fact, conclusions of law and judgment entry of June 18, 1990, granted the state's motion to dismiss. The court concluded that under the doctrine of *res judicata* Esparza was precluded from raising all claims relating to ineffective assistance of counsel to the extent that they do not resort to evidence *dehors* the record. The court further found that because

Esparza failed to set forth sufficient evidentiary documents outside the record to support his ineffective assistance of counsel claims, those claims were barred. Finally, the court concluded that *res judicata* barred all other claims raised by Esparza.

It is from that judgment that Esparza filed a timely notice of appeal.

I.

Before addressing the assignments of error, a clear understanding of post-conviction relief and the applicability of *res judicata* to that remedy is essential. R.C. 2953.21 provides for petitions to vacate or set aside sentence, also known as petitions for post-conviction relief, and states in pertinent part:

> "(A) Any person convicted of a criminal offense or adjudged delinquent claiming that there was such a denial or infringement of his rights as to render the judgment void or voidable under the Ohio Constitution or the Constitution of the United States, may file a petition at any time in the court which imposed sentence, stating the grounds for relief relied upon, and asking the court to vacate or set aside the judgment or sentence or to grant other appropriate relief. The petitioner may file such supporting affidavit and other documentary evidence as well support his claim for relief.
>
> "***
>
> "(C) Before granting a hearing, the court shall determine whether there are substantive grounds for relief. In making such a determination, the court

> shall consider, in addition to the petition and supporting affidavits, all the files and records pertaining to the proceedings against the petitioner, including, but not limited to, the indictment, the court's journal entries, the journalized records of the clerk of the court, and the court reporter's transcript. Such court reporter's transcript, if ordered and certified by the court shall be taxed as court costs. If the court dismisses the petition, it shall make and file findings of fact and conclusions of law with respect to such dismissal."

It is well-established that *res judicata* is a proper ground upon which to dismiss, without hearing, a R.C. 2953.21 petition. *State v. Perry* (1967), 10 Ohio St. 2d 175. See, also, *State v. Cole* (1982), 2 Ohio St. 3d 112. Specifically, the court in *State v. Perry*, *supra*, held at paragraph nine of the syllabus:

> "Under the doctrine of *res judicata*, a final judgment of conviction bars a convicted defendant who was represented by counsel from raising and litigating in any proceeding except an appeal from that judgment, any defense or any claimed lack of due process that was *raised or could have been raised by the defendant at the trial*, which resulted in that judgment of conviction, *or on an appeal* from that judgment." (Emphasis in the original.)

In addition, the doctrine of *res judicata* is applicable to constitutional issues raised in a petition for post-conviction relief.

> "Constitutional issues cannot be considered in postconviction proceedings under Section 2953.21 *et seq.*, Revised Code, where they have already been

> or could have been fully litigated by the prisoner while represented by counsel, either before his judgment of conviction or on direct appeal from that judgment, and thus have been adjudicated against him." *Id.*, at paragraph seven of the syllabus.

Accordingly, to avoid a finding of *res judicata*, a petitioner must submit evidentiary documents containing sufficient operable facts outside the record to demonstrate that he is entitled to relief. *State v. Kapper* (1983), 5 Ohio St. 3d 36, 38, certiorari denied (1983), 464 U.S. 856. In other words, the petitioner bears the initial burden of showing that the issue could not have been determined without resort to evidence outside the record on direct appeal, *State v. Cole*, *supra*, at 114, and the petitioner is entitled to a hearing only if the allegations outside the record are not rebutted by the records of the original criminal prosecution. R.C. 2953.21 (E).

Finally, as to the issue of ineffective assistance of counsel:

> "Where defendant, represented by new counsel upon direct appeal, fails to raise therein the issue of competent trial counsel and said issue could fairly have been determined without resort to evidence *dehors* the record, *res judicata* is a proper basis for dismissing defendant's petition for postconviction relief." *State v. Cole, supra*, syllabus.

II.

Esparza's assignments of error three through fifteen argue that the trial court erred in dismissing without a hearing the fifty causes of action presented in his petition for post-

conviction relief. Esparza claims that the evidence *dehors* the record, which he submitted in support of his petition, was sufficient to require the court to grant his request for an evidentiary hearing.

Upon a thorough review of the record in this case, we conclude that causes of action one through twenty-five and twenty-eight through forty-nine were properly dismissed by the trial court because they either had already been raised on direct appeal or could have been raised on direct appeal. See *State v. Esparza* (Aug. 22, 1986), Lucas App. No. L-84-225, unreported, *State v. Esparza* (1988), 39 Ohio St. 3d 8, certiorari denied (1989), 490 U.S. 1012. Esparza was represented by new counsel on direct appeal, and each of these issues could clearly have been raised and determined upon a review of the record of the original proceedings. These claims are therefore precluded from being raised in post-conviction relief proceedings under the doctrine of *res judicata*.

Arguably, causes of action twenty-six, twenty-seven and fifty could be raised in post-conviction. However, for the following reasons we conclude that they too are precluded under the doctrine of *res judicata*.

In causes of action twenty-six and twenty-seven Esparza asserted that his trial counsel was ineffective at the guilt phase of the trial. Esparza alleged that his trial counsel breached their duty of pretrial investigation and preparation by relying on the investigative efforts of Don Johnson, prior counsel's investigator, and by failing to interview several other suspects learned of through discovery. This alleged failure to interview, Esparza asserted, weakened his reasonable doubt argument. In support of his argument, Esparza submitted to the lower court the investigative notes of Don Johnson. These notes, however, are not accompanied

by an affidavit or any statement attesting to their authenticity or origination. R.C. 2953.21(C) states that in determining whether there are substantive grounds for post-conviction relief, the court shall consider all of the records from the proceedings against the petitioner plus the petition and supporting affidavits. Although R.C. 2953.21(A) allows the petitioner to file supporting affidavits and other documentary evidence as will support his claim, reading R.C. 2953.21(A) and (B) together, we must conclude that absent a supporting affidavit, evidence submitted in the form herein, *i.e.*, notes from a private investigator, cannot be considered by a court reviewing a petition for post-conviction relief. We further note that none of these notes suggest that Esparza's trial counsel failed to interview potential suspects or witnesses.

Finally, on May 30, 1984, Esparza's trial counsel filed a motion for a new trial on his behalf. Therein they argued that the court erred as a matter of law in granting the prosecution's oral motion *in limine* denying Esparza the opportunity to present certain search warrant evidence and crime stopper information which would implicate other persons as being the perpetrator. Esparza's counsel argued that by granting the state's motion, Esparza was denied the opportunity to present evidence that may have created a reasonable doubt. The trial court denied the motion, and we affirmed that denial on direct appeal concluding that 1) Esparza's trial counsel failed to attempt to establish the admissibility of the evidence during the trial, and 2) the evidence was nevertheless inadmissible hearsay. Accordingly, petitioner's allegations in causes of action twenty-six and twenty-seven are clearly rebutted by the record of the original criminal prosecution, and were therefore properly disposed of without a hearing under the doctrine of *res judicata*.

In his fiftieth cause of action, Esparza asserted that his trial counsel was ineffective at the penalty phase of the trial because they failed to fully and thoroughly investigate and present evidence in support of mitigation. Specifically, Esparza argued that his trial counsel failed to interview potential witnesses who could have given the jury a complete explanation of his developmental history. In support of this cause of action, Esparza attached the affidavits of fourteen family members and/or friends who assert that they were either not interviewed at all by Esparza's trial counsel, or they were interviewed but were not asked to testify on defendant's behalf. In addition, petitioner attached the affidavits of three witnesses who did testify at the penalty phase but who assert that they possess additional information which they were not requested to include in their testimony.

It is well-established that the failure of trial counsel in a capital case to reasonably investigate and prepare for the sentencing phase of the trial constitutes ineffective assistance of counsel. *State v. Johnson* (1986), 24 Ohio St. 3d 87, 89, certiorari denied (1990), 494 U.S. 1039. More specifically:

> "*** the duty of defense counsel to investigate his client's background for mitigating factors is an indispensable component of the constitutional requirement that a criminal defendant—and particularly one on trial for his life—be afforded effective representation and assistance from his lawyer." *Id.*, at 90.

In *Johnson*, the Supreme Court of Ohio determined that the defendant's trial counsel's failure to put forth any mitigation evidence whatsoever and failure to request a continuance for the purposes of investigating the defendant's background for mitigating factors constituted ineffective assistance of

counsel under the facts of that case. The court, however, did state:

> "We hasten to add that the mere failure to present mitigating evidence at the penalty phase of a capital trial does not itself constitute proof of ineffective assistance of counsel or deprivation of the accused's right to a fair trial. It is conceivable that the omission of such evidence in an appropriate case could be in response to the demands of the accused or the result of a tactical, informed decision by counsel, completely consonant with his duties to represent the accused effectively. *Id.* at 91.

During the penalty phase of Esparza's capital trial, his counsel called as mitigation witnesses Richard DeLaRose (Esparza's grandfather), Virginia Gonzales (Esparza's aunt), Peter Esparza (Esparza's brother), Ralph Grennay (Esparza's foster father), and Dr. William Seman, a clinical psychologist at the Court Diagnostic and Treatment Center, who conducted a competency examination of Esparza upon a referral from the court. Through the testimony of these witnesses, a thorough picture of Esparza's traumatic life was presented to the jury and the trial judge. In addition, the jury and court were presented with a detailed juvenile court family file (Joint Exhibit A) concerning Esparza's history, character and background. The Supreme Court of Ohio, in its review of Esparza's capital trial on direct appeal, even recognized the admission of this family file as Esparza's "most persuasive argument against the imposition of the death penalty." *State v. Esparza, supra*, at 15. Moreover, in its independent weighing of the aggravating factor and the mitigating circumstances, as expressed in its opinion regarding sentencing of May 22, 1984, the trial court's consideration of Esparza's background is evident:

"The matter of other factors relevant to whether the offender should receive a death sentence must be considered. Here we encounter the lamentable conditions defendant endured throughout his babyhood, boyhood and adolescence. Defendant was born to a brutal and selfish father and an apparently submissive and ineffective mother. While in that home he was semi-starved, underclothed and sometimes unclothed, ill-shod and sometimes unshod; beaten and otherwise abused, rejected, ignored, deserted and everything but properly cared for. The same was, of course, true of his numerous siblings. His mother, who we gather loved him and whom he certainly loved, died in the defendant's ninth year. During his sad childhood and adolescence the defendant was variously placed in a children's home, briefly and unsuccessfully tried living with his maternal grandparents, was placed in foster homes, was committed to the Youth Commission, existed in another unhappy family setting when his father remarried, and generally was bounced from pillar to post. This Court has encountered cases of more miserable upbringing, but, praise God, not often. We doubt not that such conditions have marked the defendant, but from the evidence we cannot conclude that those conditions have served to compel or inexorably lead defendant to his criminalistic and violent tendencies. We find of the nine siblings who shared this background, defendant alone has compiled any serious criminal record. We find that all corrective measures provided or offered to attain for the defendant a better life, have been, soon or late (mostly soon), rejected by defendant."

In Ohio, a properly licensed attorney is presumed competent and the burden is upon appellant to show

counsel's ineffectiveness. *State v. Hamblin* (1988), 37 Ohio St. 3d 153, 155-156, certiorari denied (1988), 488 U.S. 975, rehearing denied (1989), 488 U.S. 1051. Moreover, in *Strickland v. Washington* (1984), 466 U.S. 668, the court set forth a two-part test for reviewing claims of counsel ineffectiveness. First, appellant must establish that counsel made errors so serious that counsel was not functioning as the "counsel" guaranteed by the Sixth Amendment. Second, appellant must establish that the deficient performance prejudiced appellant. *Id.* at 687.

Upon a thorough and careful review of the penalty proceedings in petitioner's capital trial, we conclude that trial counsel's failure to interview or call all potential mitigation witnesses did not amount to ineffective assistance of counsel. Through the evidence presented, it is clear that counsel reasonably investigated and prepared for the sentencing phase and that Esparza's developmental history was clearly placed before the jury. Moreover, because the issue of ineffective assistance of counsel during the penalty phase of the capital trial can be determined upon a review of the record, and without resort to evidence *dehors* the record, the trial court did not err in dismissing the fiftieth cause of action without a hearing

Accordingly, appellant's third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, twelfth, thirteenth, fourteenth and fifteenth assignments of error are not well-taken.

III.

In his second assignment of error, Esparza argues that the trial court erred when it failed to conclude that he had been denied the effective assistance of appellate counsel for

that counsel's failure to properly raise certain issues on appeal.

The Supreme Court of Ohio has recently held that "[c]laims of ineffective assistance of appellate counsel are not cognizable in post-conviction proceedings pursuant to R.C. 2953.21." *State v. Murnahan* (1992), 63 Ohio St. 3d 60, at paragraph one of the syllabus. Rather, such claims "*** may be raised in an application for reconsideration in the court of appeals or in a direct appeal to the Supreme Court pursuant to Section 2(B)(2)(a)(iii), Article IV of the Ohio Constitution." *Id.*, at paragraph two of the syllabus. The court did, however, recognize that in some situations a claim of ineffective assistance of appellate counsel would not be timely discovered. Accordingly, the court further held:

> "Where the time period for reconsideration in the court of appeals and direct appeal to the Supreme Court has expired, a delayed claim of ineffective assistance of appellate counsel must first be brought in an application for delayed reconsideration in the court of appeals where the alleged error took place, pursuant to App. R. 26 and 14(B), and if delayed reconsideration is denied then the defendant may file for delayed appeal in the Supreme Court, pursuant to Section 8, Rule II of the Rules of Practice of the Supreme Court." *Id.*, at paragraph three of the syllabus.

To the extent Esparza has any claims for ineffective assistance of appellate counsel, he must raise them under the procedures established in *Murnahan*.

In his second assignment of error appellant also has raised the issue of the legality of his sentence. Esparza contends that because the indictment in this case was

defective, he was not convicted of an offense for which the death penalty could be imposed in Ohio. Specifically, Esparza argues that R.C. 2929.03(A) and R.C. 2929.04(A) confer subject matter jurisdiction on the sentencer in a capital case by stating that the death penalty may only be imposed where a proper death specification was charged and adjudicated. Because he was not convicted of a capital specification under R.C. 2929.03 and R.C. 2929.04, Esparza asserts that the trial court was without subject matter jurisdiction to impose a capital sentence.

This claim was not raised by appellant in his petition for post-conviction relief, although the lower court did recognize it. Such a claim however is not barred by the doctrine of *res judicata*. It is well-established that a "[a] court has no power to substitute a different sentence for that provided for by statute," and when a court does impose a sentence not provided for by statute," and when a court does impose a sentence not provided for by law, such sentence is void. *Colegrove v. Burns* (1964), 175 Ohio St. 437, 438. Moreover, an attack on a void judgment is always proper and may be raised at any point during a case's proceedings. *In re Murphy* (1983), 10 Ohio App. 3d 134, 138.

R.C. 2929.03(A) states:

> "(A) If the indictment or count in the indictment charging aggravated murder does not contain one or more specifications of aggravating circumstances listed in division (A) of section 2929.04 of the Revised Code, then, following a verdict of guilty of the charge of aggravated murder, the trial court shall impose a sentence of life imprisonment with parole eligibility after serving twenty years of imprisonment on the offender."

R.C. 2929.04(A) provides in relevant part:

> "(A) Imposition of the death penalty for aggravated murder is precluded, unless one or more of the following is specified in the indictment or count in the indictment pursuant to section 2941.14 of the Revised Code and proved beyond a reasonable doubt:
>
> "***
>
> "(7) The offense was committed while the offender was committing, attempting to commit, or fleeing immediately after committing or attempting to commit *** aggravated robbery, *** and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design."

The indictment charging Esparza with the aggravated murder of Melanie Gerschultz reads in the first count:

> "*THE JURORS OF THE GRAND JURY of the State of Ohio, within and for Lucas County, Ohio, on their oaths, in the name and by the authority of the State of Ohio, do find and present that* GREGORY ESPARZA, on or about the 12th day of February, 1983, in Lucas County, Ohio, did purposely cause the death of Melanie Gerschultz, while committing aggravated robbery, in violation of §2903.01(B) of the Ohio Revised Code, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.
>
> "*SPECIFICATION TO FIRST COUNT:*

> THE GRAND JURORS FURTHER FIND AND SPECIFY that the defendant had a firearm on or about his person or under his control while committing the offense pursuant to §2929.71, Ohio Revised Code.
>
> "***
>
> "*ADDITIONAL SPECIFICATION TO THE FIRST COUNT:*
> THE GRAND JURORS further find and specify that the said offense was committed while GREGORY ESPARZA, the accused herein, was committing aggravated robbery."

Esparza contends that because the additional specification did not allege the [sic] he was either the principal offender or had committed the offense with prior calculation and design, it did not specify an offense for which the death penalty could be imposed. He therefore argues that the trial court was without jurisdiction to impose his death sentence.

Under Crim. R. 7(B), an indictment must charge an offense in words sufficient enough to give the accused notice of all the elements with which he is charged. Upon a review of the indictment in this case, we conclude that it did notify Esparza of all of the elements of the offense. In particular, we conclude that where only one defendant is named in an indictment alleging felony murder, it would be redundant to state that the defendant is being charged as the principal offender. Only where more than one defendant is named need the indictment specify the allegation "principal offender." We further note that the words "death penalty specification as to the first count" are clearly typed on the front of the indictment.

Accordingly, appellant's second assignment of error is not well-taken.

IV.

Finally, in his first assignment of error, Esparza contends that the lower court erred in dismissing his post-conviction relief petition without allowing him an evidentiary hearing.

As cited, *supra*, R.C. 2953.21(C) provides that before granting an evidentiary hearing on a petition for post-conviction relief, a court must determine whether there are any substantive grounds for relief. Moreover, under division (E) of that provision, unless the petition, files and records of the case show that the petitioner is not entitled to relief, the court shall have an evidentiary hearing. As we have set forth *supra*, none of the claims raised by appellant as supported by the evidence he submitted, establish that there were any substantive grounds for relief. Accordingly, the lower court did not err in refusing to grant appellant an evidentiary hearing, and the first assignment of error is not well-taken.

On consideration whereof, the court finds substantial justice has been done the party complaining, and the judgment of the Lucas County Court of Common Pleas is affirmed. We further find that there were reasonable grounds for this appeal. Appellant is ordered to pay the court costs of this appeal.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure. See also Supp. R. 4, amended 1/1/80.

Peter M. Handwork, P.J. _____
PRESIDING JUDGE

George M. Glasser, J. _____
CONCUR JUDGE

James R. Sherck, J., dissents,
in part, and concurs, in part.

SHERCK, J., concurring in part and dissenting in part.

While I concur with the majority in Parts I, II, and IV of the decision, I must respectfully dissent from Part III of the opinion concerning the validity of the indictment and sentence.

A capital offense in Ohio must be charged by indictment. The indictment must include one of the specifications listed in R.C. 2929.04(A). The majority recognizes, and I agree, that a valid indictment is a jurisdictional prerequisite and that lack of subject matter jurisdiction may be raised at any time. Furthermore, I agree with the conclusion that the trial court lacks jurisdiction to impose a sentence of death if the indictment does not include one of the required specifications. However, I disagree with the majority's opinion that the indictment in this case was sufficient to vest the trial court with authority to impose a sentence of death.

The specification and the underlying charge in the indictment are evaluated by similar standards. Crim. R. 7(B) states that the indictment is sufficient if it states the charge "*** in the words of the applicable section of the statute as long as the words of that statute charge an offense, or in any words sufficient to give the accused notice of all the elements of the offense with which he is charged." Likewise, R.C. 2941.14(C), concerning specifications of aggravating

circumstances, provides that "[t]he aggravating circumstance may be stated in the words of the subdivision in which it appears, or in words sufficient to give the accused notice of the same." In *State v. Jester* (1987), 32 Ohio St. 3d 147, certiorari denied (1988), 484 U.S. 1047, the court evaluated the sufficiency of a specification under the standards of Crim. R. 7, thus it appears that specifications in indictments are to be evaluated in the same manner as the underlying charges in an indictment.

In the myriad of reported opinions evaluating the sufficiency of an indictment, there are two recurrent themes. One of them, following Crim. R. 7, requires the indictment to give adequate notice to the accused. See, *e.g.*, *Boynton v. Sacks* (1962), 173 Ohio St. 526; *State v. Morris* (1982), 8 Ohio App. 3d 12, 16. This is the holding of the majority. The second theme, however, is equally important. The courts of this state have consistently held that an indictment must allege every material element of the offense. *State v. Sellards* (1985), 17 Ohio St. 3d 169; *State v. Ross* (1967), 12 Ohio St. 2d 37; *State v. Cimpritz* (1953), 158 Ohio St. 490; *Harris v. State* (1932), 125 Ohio St. 257; *Tesca v. State* (1923), 108 Ohio St. 287.

In *State v. Ross, supra,* the indictment was insufficient when it followed the words of the pertinent statute but failed to allege a judicially created *mens rea* element. The indictment was certainly sufficient to allow the accused to review the law governing the case and determine what elements were included in the charge, but the indictment was nonetheless insufficient for failure to explicitly charge an element.

The two themes in the cases can be and were reconciled in *Ross*. They are not competing, but instead are complementary. An indictment must allege every material

element of the offense or specification, but the language used to make the allegation need only be sufficient to put the accused on notice. Silence is not sufficient. Where the indictment fails to include a material element of the offense or specification, it must fail. On the other hand, where the indictment includes every material element, but in less than perfect language, it will be considered sufficient if it gives adequate notice to allow the accused to prepare his defense. The indictment in this case is completely silent on a material element of the specification. It is, therefore, insufficient and the trial court exceeded its authority by imposing the death penalty.

Even if Crim R. 7 provided the only standard by which an indictment is to be evaluated, I would find this indictment insufficient. Crim R. 7 states that an indictment charge an offense *in words* sufficient to give the accused notice of the elements of the offense with which he is charged. The holding of the majority today allows an indictment to give notice by the *absence* of words. The majority holds that the failure to mention any accomplice is sufficient to charge the accused with being the principal offender, or committing the aggravated murder with prior calculation and design. This logic escapes me. I would reverse the sentence of death and, in accordance with R.C. 2929.03(A), impose a sentence of life imprisonment.

"ASSIGNMENT OF ERROR NO. I
THE TRIAL COURT ERRED IN DISMISSING APPELLANT'S POST-CONVICTION RELIEF PETITION WITHOUT ACCORDING HIM AN EVIDENTIARY HEARING.

"ASSIGNMENT OF ERROR NO. II
THE TRIAL COURT ERRED WHEN IT FAILED TO FIND THAT APPELLANT HAD BEEN

DENIED EFFECTIVE ASSISTANCE OF APPELLATE COUNSEL.

"ASSIGNMENT OF ERROR NO. III
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 3, 4, 10, 11, 37 AND 38 BECAUSE THE ADMISSION OF NUMEROUS PREJUDICIAL UNWARNED STATEMENTS OF APPELLANT ESPARZA VIOLATED HIS RIGHTS TO COUNSEL, AND AGAINST SELF INCRIMINATION AND CRUEL AND UNUSUAL PUNISHMENT UNDER THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

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THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 1, 3, 4, 7, 9, 16, 17, 37 AND 38 BECAUSE APPELLANT ESPARZA WAS DENIED INDEPENDENT AND COMPETENT EXPERT ASSISTANCE AT THE PENALTY PHASE OF HIS CAPITAL TRIAL, IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS.

"ASSIGNMENT OF ERROR NO. V
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 2, 3, 4, 5, 6, 8, 9, 10, 11, 12, 13, 14, 17, 36, 37, 38, 39, 40, 44 WITHOUT HEARING BECAUSE THE ADMISSION OF AN OVERWHELMING AMOUNT OF NON-STATUTORY AGGRAVATING CIRCUMSTANCE EVIDENCE IN APPELLANT'S CAPITAL SENTENCING HEARING VIOLATED HIS RIGHTS OF DUE PROCESS AND AGAINST

CRUEL AND UNUSUAL PUNISHMENT AS GUARANTEED BY THE FIUFTH, EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"ASSIGNMENT OF ERROR NO. VI
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 1, 3, 8, 14, 15, 16, 43 AND 50 WITHOUT HEARING BECAUSE THE JURY WAS PRECLUDED FROM CONSIDERING RELEVANT MITIGATION EVIDENCE IN VIOLATION OF APPELLANT'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION, AND SECTION 9, ARTICLE I, OF THE OHIO CONSTITUTION.

"ASSIGNMENT OF ERROR NO. VII
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 35, 36, 39 AND 40 WITHOUT A HEARING BECAUSE THE STATE'S MISCONDUCT AT BOTH PHASES OF TRIAL DEPRIVED APPELLANT ESPARZA OF HIS RIGHT TO A FAIR TRIAL AND RELIABLE DETERMINATION OF PENALTY AS GUARANTEED BY THE FIFTH, SIXTH, EIGHTH, AND FOURTEENTH AMENDMENT [*sic*] TO THE UNITED STATES CONSTITUTION AND SECTIONS 2, 9, 10 AND 16, ARTICLE I OF THE OHIO CONSTITUTION.

"ASSIGNMENT OF ERROR NO. VIII
THE TRIAL COURT ERRED IN FAILING TO FIND THAT APPELLANT WAS DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS DETAILED IN THE THIRTY SEVENTH, FORTY

THIRD AND FIFTEENTH [*sic*] CAUSES OF ACTION IN APPELLANT'S PETITION FOR POST-CONVICTION.

"ASSIGNMENT OF ERROR NO. IX
APPELLANT ESPARZA WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL AT HIS CAPITAL TRIAL AND HE WAS PREJUDICED THEREBY IN VIOLATION OF HIS RIGHTS UNDER THE UNITED STATES AND OHIO CONSTITUTION.

"ASSIGNMENT OFF [*sic*] ERROR NO. X
APPELLANT'S CONVICTION AND DEATH SENTENCE WAS [*sic*] NOT SUSTAINED BY SUFFICIENT EVIDENCE.

"ASSIGNMENT OF ERROR NO. XI
THE TRIAL COURT ERRED IN DISMISSING THE EIGHTEENTH, NINETEENTH AND TWENTIETH CAUSES OF ACTION OF APPELLANT'S POST-CONVICTION RELIEF PETITION, WHICH CONCERNED IMPROPER AND PREJUDICIAL JURY INSTRUCTIONS DURING BOTH THE GUILT AND PENALTY PHASE OF APPELLANT' [*sic*] TRIAL.

"ASSIGNMENT OF ERROR NO. XII
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 3, 4, 6, 9, 10, 37 AND 38 WITHOUT HEARING BECAUSE EVIDENT [*sic*] COMMENTING ON HIS SILENCE WAS ADMITTED AGAINST HIM DURING THE PENALTY PHASE OF HIS CAPITAL TRIAL.

"ASSIGNMENT OF ERROR NO. XIII
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 1, 12, 36, 37 AND 39 WITHOUT HEARING BECAUSE VICTIM IMPACT EVIDENCE ADMITTED DURING THE PENALTY PHASE VIOLATED APPELLANT ESPARZA'S RIGHTS UNDER THE EIGHTH AND FOURTEENTH AMENDMENTS TO THE UNITED STATES CONSTITUTION.

"ASSIGNMENT OF ERROR NO. XIV
THE TRIAL COURT ERRED BY DISMISSING APPELLANT'S POST-CONVICTION RELIEF PETITION IN WHICH HE DETAILED ERRORS IN THE VOIR DIRE OF HIS JURY WHICH DEPRIVED APELLANT OF HIS CONSTITUTIONAL RIGHTS.

"ASSIGNMENT OF ERROR NO. XV
THE TRIAL COURT ERRED BY DISMISSING CAUSES OF ACTION 19, 34, 35, 45, 46, 47, 48 AND 49 BECAUSE OHIO'S DEATH PENALTY STATUTES ARE UNCONSTITUTIONAL, ESPECIALLY AS APPLIED TO MR. ESPARZA.

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[1] The following is a summary of each of the counts alleged in Esparza's petition for post-conviction relief. Each of the counts alleges that Esparza's judgment was void or voidable because he was denied his rights under various amendments to the United States Constitution and/or various sections of the Ohio Constitution. Herein we have summarized petitioner's bases for his constitutional claims solely as a reference for our opinion. To thoroughly review Esparza's causes of action, please see the petition.

1. The trial court overruled Esparza's motion for a continuance of the mitigation proceedings. This denial affected counsel's ability to effectively assist petitioner.

2. Cumulative evidence at the sentencing hearing was admitted in violation of Evid. R. 401, 402 and 403.

3. By way of the presentence report, a staggering amount of non-statutory aggravating circumstance evidence was admitted during the penalty phase.

4. By way of the Court Diagnostic & Treatment Center's psychological report, a staggering amount of non-statutory aggravating circumstance evidence was admitted during the penalty phase.

5. Evidence of petitioner's prior criminal record was admitted at the penalty phase despite his decision not to testify.

6. The presentence report commented on petitioner's exercise of his right to remain silent.

7. Evaluation of petitioner by the Court Diagnostic & Treatment Center was improper and insufficient.

8. The presentence report was defective in that it was inadequate under Crim. R. 32.2, went far beyond the scope of Crim. R. 32.2, and was improperly admitted at the penalty phase.

9. The psychological report admitted at penalty phase improperly commented on petitioner's exercise of his right to remain silent, on his claims of innocence and of his claim of

lack of knowledge or memory of the offense for which he was convicted; and characterized such claims as volitional.

10. Although petitioner had exercised his right not to make a statement during the penalty phase, statements made by him during the preparation of the presentence report were included in the report and admitted at the penalty phase. Petitioner was never warned that the statements would be used against him.

11. Petitioner's Family Court filed [*sic*] was admitted at the penalty phase. Petitioner was never warned that his statements contained therein would be used against him.

12. Photographs of the decedent with the American flag as the background and a photo of one of her children were admitted at the penalty phase. Also, the presentence report commented that the decedent did nothing to facilitate the shooting. The admission of this evidence was irrelevant and highly inflammatory.

13. The presentence report contained another presentencereport prepared for an unrelated 1982 case and a 1983 probation violation report. This evidence was highly prejudicial to petitioner.

14. The presentence report contained serious inaccuracies and internal contradictions on important mitigation issues.

15. The trial court improperly excluded relevant mitigation evidence (a letter petitioner had written to his foster parents) and precluded petitioner's counsel from eliciting evidence of mitigating factors from the psychologist (Dr. Seman).

16. The trial court refused to grant petitioner's motion under R.C. 2929.024 for an independent psychologist to assist in preparation for the mitigation phase.

17. The trial court permitted the state to call a state psychologist to testify at the mitigation hearing for non-rebuttal purposes.

18. The trial court erred in its charge to the jury at the guilt-innocence phase of petitioner's trial. (Petitioner lists nine alleged errors in charge).

19. The trial court erred in its charge to the jury at the penalty phase of petitioner's trial. (Petitioner lists eleven alleged errors in charge).

20. Erroneous jury instructions plus other penalty phase errors caused the jury to misunderstand its role and responsibility at this phase of the proceedings.

21. Juror misconduct. Juror Hoffman admitted to listening to a radio broadcast about the case after the court admonished the jury to avoid the media. Juror Bear reported that while waiting to be examined, she and other jurors discussed the case. The trial court made no inquiry as to these discussions. Although these jurors did not hear or deliberate the case, there is a strong likelihood that their misconduct tainted other members of the pool who were ultimately seated.

22. The trial court secured from each juror who served a commitment during voir dire that he or she could impose the death penalty.

23. The trial court voir dired each juror separately concerning their feelings on the death penalty. Three jurors were excused because they stated that they could not impose death. Petitioner's sentencing was made by a jury more likely to impose death.

24. The prosecutor systematically exercised preemptory challenges to exclude from the jury those who voiced reservations about the death penalty.

25. The trial court employed an erroneous voir dire procedure and permitted the state an extra preemptory challenge.

26. Petitioner's trial counsel was ineffective at the guilt phase of the trial by breaching their duty of pretrial investigation and preparation.

27. Petitioner's trial counsel was ineffective at the guilt phase of the trial by failing to raise the existence of other perpetrators or participants in the robbery and killing, although counsel learned of at least six other suspects through discovery.

28. Trial counsel was ineffective at the guilt phase of the trial by calling Else Dile as a witness for petitioner without first investigating her testimony. Dile was originally listed as a potential witness for the state. Her testimony helped the state prove its case.

29. Trial counsel was ineffective by failing to make appropriate objections to the prosecutor's closing argument at the guilt phase.

30. Trial counsel was ineffective by failing to object to certain guilt phase testimony of Lisa Esparza, and by failing to request a curative instruction or request a mistrial.

31. Trial counsel was ineffective by failing to properly pursue an objection made to the testimony of a state's witness, in the guilt phase, concerning a purported telephone call, by failing to request that the court's reason for overruling the objection be placed on the record, by failing to request that the court give a limiting instruction to the jury, and by failing to move for a mistrial.

32. Trial counsel was ineffective by failing to request to review any prior recorded statements made by the state's witnesses, pursuant to Crim. R. 16(B), before cross-examining those witnesses.

33. Trial counsel was ineffective by failing to make appropriate objections to the state's closing argument of the guilt phase.

34. The instructions given to the jury by the trial court, and the arguments of the state, in the penalty phase, misled the jury as to its sentencing role and the scope of discretion.

35. Prosecutors engaged in misconduct throughout the guilt phase of the trial. (Petitioner lists eight separate incidents of alleged misconduct.)

36. Prosecutors engaged in misconduct throughout the penalty phase of the trial. (Petitioner lists thirty-seven separate incidents of alleged misconduct.)

37. The trial court overruled petitioner's motions to withdraw his request for a presentence report and psychological evaluation.

38. The state psychologist testified that, in the past, petitioner denied the crimes for which he was eventually convicted. This destroyed the presumption of innocence.

39. The testimony elicited by the state during direct and cross-examination of witnesses during the penalty phase consisted almost entirely of non-statutory aggravating circumstance evidence.

40. The death sentence was based on constitutionally invalid aggravating circumstance evidence. The state argued the existence of petitioner's anti-social personality disorder as an aggravating circumstance supporting the death penalty.

41. Trial counsel was ineffective by committing errors and omissions during the voir dire.

42. Trial counsel was ineffective by committing errors concerning the court's guilt phase instructions.

43. Trial counsel was ineffective by committing errors and omissions during the penalty phase.

44. The jurors' reasons for recommending death were contrary to the evidence.

45. The jury was repeatedly informed by both the trial court and the prosecutor that a death verdict was a non-binding recommendation to the court, and therefore diminished the jurors' sense of responsibility.

46. The trial court and prosecutor engaged in improper burden shifting during the penalty phase.

47. Ohio's capital statute fails to narrow the class of persons eligible for the death penalty.

48. The mandatory nature of Ohio's capital statue [*sic*] prevented the jury from determining the appropriate punishment in petitioner's case.

49. Petitioner's conviction and sentence were in error for all of the reasons set forth in his appeals to the Sixth District Court of Appeals, the Supreme Court of Ohio, and the United States Supreme Court.

50. Trial counsel was ineffective in failing to fully and thoroughly investigate and present evidence in the penalty phase of petitioner's trial.

Opposition Brief Unavailable for Filming at This Time